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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

S.G. FRANTZ CO., INC.,

Petitioner,

vs.

DIRECTOR, DIVISION OF TAXATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

WILLIAM J. BIGHAM
Counsel of Record

STERNS, HERBERT & WEINROTH, P.A.
Attorneys for Petitioner, S.G. Frantz Co., Inc.
186 West State Street
P. O. Box 1298
Trenton, New Jersey 08607
(609) 392-2100

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

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Questions Presented

1. Did respondent, in determining that performance by petitioner of repairs to equipment was the taxable activity under the New Jersey retail sales and use tax law and in proceeding to tax out-of-state purchasers who took delivery of repaired equipment at the place of use in another state, tailor the tax in a manner that resulted in

(a) error in apportionment, by taxing consumption that took place in another state?

(b) discrimination against interstate commerce, by taxing consumption which was also taxed or taxable by the state in which the sales were consummated by passage of title and possession, while intrastate sales of like character were subject to only one tax on consumption?

(c) lack of relationship of the incidence of the tax and of its measure to services provided by the vendor's state to the taxpayer?

2. Did respondent violate rights of the purchasers and of petitioner under the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States:

(a) by changing the settled construction of the law, whereunder such interstate sales of repairs had not been subject to the tax, without complying with the state statute governing administrative rule-making?

(b) by enforcing his changed construction retroactively to tax purchasers in interstate sales completed by delivery of repaired equipment out of the state during the preceding two years and by assessing petitioner for deficiencies in collecting the tax from purchasers who refused to pay it with respect to these completed sales?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

* S.G. Frantz Co., Inc. has no parent company, subsidiary or affiliate.

Opinions Below

The letter opinion of the Tax Court of New Jersey (Appendix A, *infra,* pp. 1a-2a) was not reported. The opinion states that the legal and factual issues are the same as those involved in *Airwork Service Division* v. *Director, Division of Taxation,* (a case argued before the Tax Court on the day this case was argued and decided five days earlier) and incorporated herein by reference the opinion in that case.

The opinion of the Tax Court of New Jersey in *Airwork Service Division* v. *Director, Division of Taxation,* (Appendix B, *infra,* pp. 3a-23a) is reported at 2 N.J. Tax 329 (1981).

The opinion of the Appellate Division of the Superior Court of New Jersey in *Airwork* (Appendix C, *infra,* pp. 24a-26a) affirming the judgment of the Tax Court is reported at 4 N.J. Tax 532 (App. Div. 1982).

After affirmance by the Appellate Division of the Tax Court's judgment in *Airwork* and after the Supreme Court of New Jersey had granted Airwork's petition for certification, while petitioner's appeal to the Appellate Division of the Superior Court of New Jersey was pending unheard, petitioner moved in the Supreme Court of New Jersey for direct certification of its appeal. The order of the Supreme Court denying petitioner's motion without opinion (Appendix D, *infra,* p. 27a) was not reported.

The opinion of the Appellate Division of the Superior Court of New Jersey affirming the judgment of the Tax Court herein substantially for the reasons expressed by the Tax Court herein and in *Airwork* (Appendix E, *infra,* pp. 28a-29a) was not reported.

The opinion of the Supreme Court of New Jersey in *Airwork* affirming the judgment of the Appellate Division (Appendix F, *infra,* pp. 30a-58a) is reported at 97 N.J. 290 (1984).

The order of the Supreme Court of New Jersey denying petitioner's petition for certification of the judgment of the Appellate Division herein and dismissing its appeal herein without opinion (Appendix G, *infra,* pp. 59a-60a) is reported at 97 N.J. 691 (1984).

The order of the Supreme Court of New Jersey denying petitioner's motion for reconsideration herein (Appendix H, *infra,* p. 61a) was not reported.

Jurisdiction

The judgment of the Appellate Division of the Superior Court of New Jersey affirming the Tax Court's opinion of April 1, 1981, herein (Appendix A, *infra,* pp. 1a-2a) was entered on May 31, 1983 (Appendix E, *infra,* pp. 28a-29a).

The order of the Supreme Court of New Jersey denying petitioner's petition for certification and dismissing its appeal herein (Appendix G, *infra,* pp. 59a-60a) was entered September 18, 1984. A motion for reconsideration, timely filed, was denied on October 23, 1984 (Appendix H, *infra,* p. 61a). On January 18, 1985, Mr. Justice Brennan extended petitioner's time within which to file a petition for a writ of certiorari up to and including March 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional and Statutory Provisions

1. Article I, §8, cl. 3 of the United States Constitution provides:

> "The Congress shall have Power * * *
>
> "To regulate Commerce with foreign nations, and among the several States * * *"

The Fourteenth Amendment, §1 to the United States Constitution provides:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Article 4, §7, ¶4 of the Constitution of the State of New Jersey provides:

> "4. To avoid improper influences which may result from intermixing in one and the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title. This paragraph shall not invalidate any law adopting or enacting a compilation, consolidation, revision, or rearrangement of all or parts of the statutory law."

3. Provisions of the New Jersey Sales and Use Tax Act, L.1966, c.30, as amended by L.1966, c.53, c.140; L.1967, c.25; L.1968, c.106; L.1969, c.143; L.1970, c.7, c.25 and L.1972, c.27, codified at N.J.S.A. 54:32B-1 *et seq.*, relevant to the issues herein, are the title of the Act and the following sections, which are set forth in Appendix I, *infra*: §§2(c), (d), (f), (h), (i)(1) (A), (B), (C), (D); (y); 3(a), (b)(2); 6; 7; 11(3), (6); 12(a), (b); 14(a), (b), (c), (d); 24 (1), (6).

4. Provisions of the New Jersey Administrative Procedure Act, L.1968, c.410, codified at N.J.S.A. 52:14B-1 *et seq.*, relevant to issues herein are the following sections, which are set forth in Appendix J, *infra*: §§2(e); 4(a)(1) and (2); 4(d).

Statement of the Case

1. The New Jersey Sales and Use Tax Act, which took effect on July 1, 1966, is in form and substance like the New York Sales and Compensating Use Tax Law. Compare N.J.S.A. 54:32B-1 *et seq.* with N.Y. L.1965 c.93, McKinney's Consol. Laws Ann., Tax Law 1101, *et seq.* Under both the New York and the New Jersey laws the sales tax is imposed on the purchaser for consumption. N.Y. Tax Law §§1101, 1105, 1131, 1132; N.J.S.A. 54:32B-§§ 2, 3, 12. The vendor is required to collect the tax, to charge it to the purchaser separately from the sales price and is made liable, as an insurer, for its payment to the state. N.Y. Tax Law §§1132, 1133; N.J.S.A. 54:32B-§§12, 13.

The New York Sales and Compensating Use Tax Law imposed statewide taxes which theretofore had been imposed locally by municipalities. *See* New York State Legislative Annual—1965, 432 (A.I. 5804, Pr. 6430, Rules Com. Ch. 93). In form and substance the New York State law was derived from the local laws of New York City. The first of these, entitled "Tax on Sales of Certain Properties and Services in the City of New York" and published as Local Law No. 25 of 1934 came before this Court in *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33 (1940), for review of the constitutionality of sales tax imposed on purchasers in the city of goods shipped into the state pursuant to contracts made in New York City. This Court sustained the tax as one laid generally on consumers within the state which had "* * * no different effect upon interstate commerce than a tax on the 'use' of property which has just been moved in interstate commerce * * *". *Id.* at p. 49.

During at least the first seven years following its enactment the New Jersey Sales and Use Tax Act was construed and administered in conformance with the princi-

ples which this Court set forth in *Berwind-White*. Purchasers for consumption within the state of tangible personal property or of services to such property were liable for sales tax measured by the price. Out-of-state purchasers of tangible personal property or of repairs to such property were not liable for the New Jersey retail sales tax unless they took delivery of the property within the state.[1]

Respondent announced in consecutive issues of "State Tax News", a bi-monthly newsletter published by the Division of Taxation of New Jersey, for August-September and October-November, 1973, a changed construction whereby the retail sales tax was imposed on out-of-state purchasers of services to tangible personal property who

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[1] The Supreme Court of New Jersey, in its majority opinion in *Airwork*, took note of the construction of the law announced at the time of its enactment:

> "The Act was passed in 1966 to be effective July 1 of that year. On June 28, 1966 the Sales and Use Tax Bureau of the Division of Taxation issued a press release, containing questions and answers about the Act, that was published on July 11, 1966, in a commercial tax news service —Report 162 of the Commerce Clearing House *New Jersey Tax Reports*. The press release included the following statement:
>
> Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract to a purchaser outside the State for use outside the State are exempt from the sales tax." 97 N.J. 290 at 294.

The dissenting opinion in *Airwork* states with regard to this release:

> "The Division never adopted formal regulations governing this specific issue. Thus the Release, continuously printed, was the only statement on the topic for seven years." *Id.* at 305.

took delivery of the serviced property out of the state.[2] Respondent proceeded to enforce his changed construction of the law retroactively to August 12, 1971. In these proceedings respondent contends that the construction of the law set forth in an unreported decision on August 12, 1971, of the Division of Tax Appeals of the New Jersey Division of Taxation in *Fisher-Stevens, Inc.* v. *Director, Division of Taxation,* Docket No. ST 109, *aff'd* 121 N.J. Super. 513 (App. Div. 1972), *certif. denied* 62 N.J. 575 (1973), is consistent with his changed construction announced in 1973.

In 1974 the New Jersey Legislature adopted an amendment to the Sales and Use Tax Act providing for specific exemption from sales tax of sales of services to tangible property delivered to out-of-state purchasers. The Governor did not sign the bill because, according to his explanatory statement, it would result in loss of substantial revenue. A similar bill became law in 1977. L.1977, c.54; N.J.S.A. 54:32B-3(5). Statements of the Committee on Taxation of the New Jersey Assembly appended to both the 1974 bill and the 1977 enactment declared the Committee's view to be that under the original interpretation of the law tax was not imposed on sales of services on tangible personal property delivered out of the state. *See Airwork,* 97 N.J. 290 at 298-299, 306-307.

2. After an audit of petitioner's books and records in 1974 and after administrative proceedings respondent made a final determination on June 16, 1975, assessing petitioner for a deficiency in sales tax collections with respect to

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[2] The announcement in the October-November issue of "State Tax News" was as follows:

> "*Service Performed in New Jersey*—The charges for taxable services performed in New Jersey upon tangible personal property are subject to the sales tax whether the property serviced is delivered within New Jersey or out-of-state."

sales of repairs to customers out of the state for use out of the state, in each of which the property was delivered to a purchaser in another state, in the amount of $1,455.16, representing $1,319.63 in tax and $135.33 in interest. Petitioner paid the tax and interest so assessed. Although respondent's original determination assessed deficiency in collections of the tax with respect to sales of repair services to out-of-state customers during the entire period audited (April 1, 1971 through March 31, 1974), the assessment was revised at petitioner's insistence to exclude sales which had occurred prior to August 12, 1971, the date of the decision of the Division of Tax Appeals in *Fisher-Stevens.*

Petitioner has been engaged since 1936 in the business of designing and manufacturing products which include lines of magnetic separators used in industrial processing of materials, which it sells to customers throughout the United States and in most of the countries of the world. Since 1950 all of petitioner's business and manufacturing operations have been conducted at its place of business in Lawrence Township, New Jersey.

It has been petitioner's practice to inspect equipment sent to it for repair, obtain authority to proceed with the required repairs at an agreed price, perform the repairs at its New Jersey plant, cause the repaired equipment to be delivered to the customer's place of busines, and mail an invoice to the customer setting forth the repairs performed and the charge therefor. Since July 1, 1966, the invoices which petitioner sent to customers within the state have also showed a separate charge for the sales tax. Petitioner did not, until after respondent caused notice of the deficiency assessment to be issued on October 17, 1974, charge to its customers, collect or remit to the state sales tax with respect to any sales of repairs to out-of-state customers delivered out of the state because petitioner believed that imposition by New Jersey of its retail sales

tax on the purchasers in such transactions was forbidden under the decisions of this Court concerning state taxation of interstate commerce.

After paying the deficiency assessment petitioner attempted to collect from its out-of-state customers the New Jersey sales tax imposed on them pursuant to respondent's changed construction of the law. The amount collected from customers aggregated $452.26; the balance assessed and paid, $867.37, petitioner was unable to collect from the purchasers.

Petitioner filed a timely petition of appeal with the former Division of Tax Appeals of the New Jersey Division of Taxation on September 15, 1975 contesting respondent's deficiency assessment on the grounds that the assessment lacked statutory authority, burdened interstate sales with a risk of multiple taxation not born by intrastate commerce, was imposed pursuant to a rule promulgated without compliance with the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B- §§2(e); 4(a)(1) and (2); 4(d), was arbitrary and unreasonable, denied to petitioner and to the out-of-state purchasers equal protection of the law and deprived them of property without due process of law. Petitioner and respondent agreed to a stipulation of facts on June 23, 1979. Respondent moved in the Tax Court of New Jersey for summary judgment, and petitioner cross-moved for summary judgment on the grounds stated in its petition of appeal.[3] Argument of the motion and cross-motion was heard by the Tax Court on January 24, 1980, immediately after it heard the arguments of the parties in *Airwork*, on a motion and cross-motion for summary judgment.

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[3] Matters pending in the former Division of Tax Appeals of the New Jersey Division of Taxation on December 31, 1979, were transferred to the newly created Tax Court of New Jersey and the Division of Tax Appeals ceased to exist as of that date, pursuant to L.1978, c.33 codified as N.J.S.A. 2A:3A-1 *et seq.*

Petitioners' briefs in the Tax Court contended, *inter alia,* that (1) transactions subjected to retail sales tax are expressly limited to sales to persons within the state by the New Jersey statute, which is in form and substance like the New York City statute approved by this Court in *McGoldrick* v. *Berwind-White Co.,* 309 U.S. 33 (1940), and was intended by the Legislature to tax consumption within the state in harmony with the national system of sales and use taxation; (2) only sales consummated by delivery of the repaired equipment within the state may be subjected to retail sales and use taxation under decisions of this Court holding that the incidence of the tax is on the purchaser, that the activity taxed is consumption, that in interstate sales the market state may lay a tax on the purchaser for consumption after interstate commerce is at an end, and that consequently the state of the seller may not impose retail sales tax when passage of title and possession takes place in another state lest the sale be taxed at both ends; (3) under respondent's construction the statute is a hybrid, taxing consumption within the state where the purchaser is within the state but reaching purchasers out of state who take delivery of the repaired goods out of the state by taxing performance of repairs by petitioner within the state; and (4) the tax imposed on out-of-state purchasers under respondent's construction has no relation to opportunities, benefits, or protection provided to the purchasers by New Jersey. The authorities on which petitioner relied included the cases decided by this Court cited in the footnote.[4]

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[4] *Diamond Nat. Corp.* v. *State Equalization Bd.,* 425 U.S. 268 (1976); *Evco* v. *Jones,* 409 U.S. 91 (1972); *Utah Tax Comm'n.* v. *Pacific Pipe Co.,* 372 U.S. 605 (1963); *Miller Bros.* v. *Maryland,* 347 U.S. 340 (1954); *Norton Co.* v. *Department of Revenue,* 340 U.S. 534 (1951); *Freeman* v. *Hewitt,* 329 U.S. 249 (1946); *International Harvester* v. *Department of the Treasury,* 322 U.S. 340 (1944); *McGoldrick* v. *Berwind-White Co., supra,* (1940); *Henneford* v. *Silas Mason, Co.,* 300 U.S. 577 (1937); *Hays* v. *Pacific Mail SS Co.,* 58 U.S. 596 (1855); *Brown* v. *State of Maryland,* 25 U.S. (12 Wheat.) 419 (1827).

The New Jersey Tax Court decided *Airwork* on March 27, 1981 and this case on April 1, 1981. In both cases it granted respondents' motion for summary judgment with respect to all issues except "the duplicative taxation aspect of the Commerce Clause issue" and denied the cross-motion. *See Airwork,* 2 N.J. Tax 329 at 352.

In its letter opinion herein the Tax Court stated that petitioner's motion was denied for the reasons stated in the *Airwork* opinion and incorporated by reference its opinion in that case. In *Airwork* the Tax Court found that under the statute repair services were subject to the sales tax

> "regardless of the destination of the repaired property following completion of the services. When the performance of an activity is subjected to a sales tax, the place of performance determines the place of taxation." *Serodino, Inc.* v. *Woods,* 568 S.W.2d 610 (Tenn. Sup. Ct. 1978); *Parish of Jefferson* v. *Ekco-Glaco,* 280 So.2d 629 (La. App. 1973)." *Id.* at 345.[5]

Noting that the New Jersey statute does not include an exemption, like that in the New York statute, of sales of services when the tangible property upon which the services are performed is delivered to the purchaser out of the state, the Tax Court concluded that the omission by

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[5] The court rests its construction of the statute on the phrase "* * * including the rendering of any service taxable under this act, for a consideration or any agreement therefor * * *" in the statutory definition of "Sale selling or purchase." N.J.S.A. 54:32B-2(f). It reads the word "rendering" in this phrase to mean *performing.* The statute, however, does not confuse these words. Services subject to tax are "* * * all services *rendered* to a person within the State, whether or not such services are *performed* within the State, upon tangible personal property * * *" in the definition of "Property and services the use of which is subject to tax." *Id.,* §2(y), (emphasis supplied).

the New Jersey Legislature of such an exemption indicated an intention to tax the services at issue. *Id.* at 345-347.[6] It found no basis for considering the resulting difference between treatment of interstate sales of tangible personal property and treatment of interstate sales of repairs to such property an irrational, arbitrary classification offensive to the Equal Protection Clause, stating:

> "The imposition of the sales tax upon all repair services performed in New Jersey is eminently rational as the State's connection with the rendition of the service is exactly the same whether or not the property is delivered beyond the State." 2 N.J. Tax 329 at 348.

The Tax Court found, further, that the due process requirement that there be some nexus between the activity to be taxed and the taxing state was satisfied because:

> "The * * * [goods] were serviced and overhauled by plaintiff entirely within New Jersey and * * * [they], as well as the property in which they were stored, enjoyed the protection and services provided by state and local government so long as they remained here." *Id.* at 348-349.

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[6] The title of the New Jersey statute includes a limitation applicable to both sales of goods and sales of services:

> "AN ACT imposing a tax on retail sales, storage and use of tangible personal property and on the sales of certain services within the State; * * *"

The New York statute does not contain such broad language limiting imposition of the tax to sales within the state. The provision of the New Jersey Constitution requiring that "* * * every law shall embrace but one object, and that shall be expressed in the title" (Art. 4, §7, ¶4) would appear to require that the taxes imposed by the New Jersey statute be only those described in the title.

With regard to other tests stated by this Court in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977), the test as to nondiscriminatory treatment of interstate transactions is satisfied, the Tax Court said, if the tax places the same burden on intrastate commerce, citing *McGoldrick* v. *Berwind-White Co.,* 309 U.S. 33 (1940). Stating that the test as to fair apportionment of the tax to local activities is satisfied if no other state could justifiably tax the transaction, the Tax Court disposed of the problem of use taxation by other states as follows:

> "Moreover, the imposition of a use tax by another state upon the same transaction does not result in multiple taxation in derogation of the fair apportionment test. *International Harvester* v. *Treasury Dep't,* 322 U.S. 340 * * * (1944); *Treasury Dep't* v. *Wood Preserving Corp.,* 313 U.S. 62 * * * (1941)." 2 N.J. Tax 329 at 350.[7]

A possibility of actual duplicative taxation existed, however, in the Tax Court's view, because:

> "Conceivably, the states of destination of the overhauled or serviced * * * [goods] impose sales, as distinguished from use taxes, on the purchases of plaintiff's services on the basis that delivery, not performance of services, is the taxable event. Alternatively, those states—or some of them—might impose a sales tax on the repair parts used by plaintiff in its work on the * * * [goods]." *Id.* at 351.

Saying that the issue was not covered in the motions for summary judgment, the Tax Court stated that the parties would be given an opportunity to submit proofs on this issue alone. *Id.* at 352. It held that the taxpayer has the burden of proving actual multiple taxation, citing

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[7] Unofficial reports of cases decided by this Court cited in quoted material are omitted here and elsewhere in this petition.

Standard Pressed Steel v. *Revenue Dept.*, 419 U.S. 560 (1975) and *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964). *Id.* at 350. Petitioner elected, and respondent agreed, to further the record by stipulating certain additional facts in lieu of submitting proofs as to the issue defined by the Tax Court.

Petitioner contended in its briefs on appeal to the Appellate Division[8] that (1) respondent tailored statutory language taxing sales of certain services within the state to tax, instead, performance of repair services within the state in order to exact a tax on interstate sales from purchasers in other states; (2) respondent's tailoring of the statute resulted in error in apportionment, by taxing consumption that took place in another state; in discrimination against interstate commerce, by taxing consumption which was also taxed by the state in which the repaired equipment was used, while intrastate sales of like character were subject to only one tax on consumption; and in lack of any relationship of the tax to the services provided to the out-of-state purchaser; (3) the Tax Court misconstrued cases decided by this Court which hold that the state of the seller may impose taxes in interstate sales transactions if the sale is consummated within the state by delivery to the out-of-state purchaser to reach its con-

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[8] In these briefs petitioner discussed, in addition to the authorities relied on in its briefs to the Tax Court of New Jersey, relevant holdings and reasoning of this Court in *Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977); *Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80 (1948); *Nippert* v. *Richmond*, 327 U.S. 416 (1946); *General Trading Co.* v. *State Tax Comm.*, 322 U.S. 335 (1944); *J.D. Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307 (1944); *Treasury Dept.* v. *Wood Preserving Corp.*, 313 U.S. 62 (1941); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939). *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938); *Eastern Air Transport* v. *South Carolina Tax Commission*, 285 U.S. 147 (1932); *Wiloil Corp.* v. *Pennsylvania*, 294 U.S. 169 (1935); and *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 299 (1852).

clusion that imposition of a use tax by another state upon the same transaction does not result in multiple taxation in derogation of the fair apportionment test; and (4) the Tax Court misconstrued cases decided by this Court which hold that the burden is on the taxpayer to demonstrate an actual risk of multiple taxation to hold, instead, that the taxpayer has the burden of demonstrating actual multiple taxation.

The Appellate Division affirmed the Tax Court's judgment in *Airwork* on April 28, 1982, 4 N.J. Tax 532, and it affirmed the Tax Court's judgment herein on May 31, 1983, in each case by a brief *per curiam* opinion, without discussion of the facts or the law relevant to the principal issues.[9] Its opinion herein affirmed "substantially for the reasons expressed by Judge Crabtree in his April 1, 1981 opinion for the Tax Court in this matter and his March 27, 1981 opinion for the Tax Court in *Airwork* * * * and in light of the determination of * * * [petitioner] to forego the opportunity to submit proofs on the issue of 'duplicative taxation' referred to therein".

In its petition for certification to the Supreme Court of New Jersey petitioner set forth grounds for appeal as of right in that the determination of the Appellate Division involved substantial questions arising under the Constitution of the United States, as to (1) whether imposition by New Jersey of the retail sales tax on the purchaser in the sales at issue results in multiple taxation, or the risk thereof; (2) whether performance by petitioner of the repairs in New Jersey provided nexus between the activity taxed and New Jersey; and (3) whether a construction of the Act by the Courts of New Jersey should be allowed to stand which is in conflict with the construction by the

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[9] After the Supreme Court of New Jersey had granted certification in *Airwork*, petitioner moved in the Supreme Court of New Jersey for direct certification of its appeal pending unheard in the Appellate Division. The motion was denied without opinion on April 29, 1983.

courts of the several states and of the United States of similar laws establishing a harmonious national system of retail sales and use taxation.

The Supreme Court of New Jersey reserved decision with respect to petitioner's petition for certification and appeal until after it had decided *Airwork* on July 23, 1984. On September 20, 1984, it denied petitioner's petition and dismissed its appeal without opinion. *S.G. Frantz Co., Inc.* v. *Director, Division of Taxation,* 97 N.J. 691 (1984). On October 25, 1984, it denied petitioner's motion for reconsideration, also without opinion.

3. In *Airwork* the Supreme Court of New Jersey affirmed the judgment below, four justices joining in the majority opinion and three justices voting for reversal. The court accepted the Tax Court's conclusion that the omission by the Legislature of a specific exemption covering services performed in New Jersey on goods delivered out of state was purposeful and showed that it intended to impose the tax with respect to the sales at issue. 97 N.J. 290 at 293-4.

On the basis of this conclusion the opinion of the New Jersey Supreme Court holds that the construction published by respondent at the time the statute was enacted misconstrued it, and that respondent's 1973 announcement, which resulted in taxation of the sales at issue, correctly aligned adminstrative construction with legislative intention (*Id.* at 294-6); that "* * * principles of equitable estoppel or similar considerations do not prevent collection of the sales taxes against the taxpayer * * *", including the taxes imposed retroactively (*Id.* at 296-299); and that compliance with the rule-making procedures prescribed by the state Administrative Procedure Act was not required because

> "Here, the taxability of these services is sufficiently clearly and directly inferable from the tax statute itself, especially in the absence of a specific exemption." *Id.* at 301; *see* discussion at 300-303.

Fisher-Stevens, Inc. v. *Director, Division of Taxation,* 121 N.J. Super. 513 (App. Div. 1972), certif. den. 62 N.J. 575 (1973) is the only case directly dealing with issues as to sales and use taxation of interstate sales mentioned in the New Jersey Supreme Court's *Airwork* opinion. Concerning that case the opinion concludes that it shows that the New Jersey Division of Taxation early in its administration of the statute "* * * was vigorously taking the position that such services [i.e., 'services performed for out-of-state taxpayers'] were taxable", that this should have been "* * * well known to similarly situated taxpayers," and that the decision therein resolved the issue. 97 N.J. 290 at 294-295.

The dissenting opinion of Garibaldi, J., in *Airwork* states, with regard to *Fisher-Stevens*:

> "*Fisher-Stevens* cannot by any stretch of the imagination be said to address the application of sales tax to the services at issue in this case. In *Fisher-Stevens* the court held that services performed and delivered in New Jersey were taxable. There was nothing novel in this approach. From the transcript of the *Fisher-Stevens* trial, it is evident that the Division's policy was not to tax the services if the finished items rather than being mailed from New Jersey were instead shipped out of the state for mailing by the customer. This policy of course reflects the exemption Airwork claims existed. To contend that Airwork somehow should have read *Fisher-Stevens* and, having digested it, should have determined that the court's language, in which it held that the "use" of direct mail services occurred entirely within this state, actually meant that the rebuilding of nonresidents' aircraft engines for use outside the state was no longer exempt from the state sales tax is beyond belief. Moreover, this expectation is even less realistic when, as here, published, official statements were made by the Division

> that clearly stated that the sales tax should not be collected for repair charges on articles that were to be delivered and used out of state." *Id.* at 307-308.

Accordingly Airwork did not receive notice of respondent's changed construction of the statute until he announced it in 1973, the dissent concludes. Since "* * * constitutional due process imposes certain limits on the retroactive application of taxing statutes * * *" and under the state Administrative Procedure Act Airwork was entitled to notice of the Division's changed position, Justice Garibaldi would hold respondent's assessment invalid. *Id.* at 310-313.

In its opinion in *Airwork* the Supreme Court of New Jersey, acknowledging that constitutional issues had been asserted at various stages of the litigation, states:

> "These issues were not determined by the courts below. We note these issues, but in the absence of their consideration by the lower courts, and without a sound and complete record to demonstrate their viability, decline to address them." 97 N.J. 290 at 302.

The Supreme Court of New Jersey erred. The Tax Court's opinion in *Airwork* acknowledges that Airwork "* * * claims a violation of the equal protection and due process provisions of the United States and New Jersey Constitutions * * *" (2 N.J. Tax 329 at 347) and "* * * alleges a violation of the Commerce Clause of the United States Constitution * * *." *Id.* at 349. The Tax Court considered and decided the issues that it perceived with respect to those claims. *See ante,* pp. 10 to 13.[10]

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[10]The statement in a footnote to the Tax Court's opinion in *Airwork* (2 N.J. Tax 329 at 339) that Airwork "* * *advanced no contentions, either in its brief or in oral argument, concerning the Commerce Clause or the Equal Protection Clause" does not apply to this case. Petitioner in briefs and oral argument in the Tax Court presented in substance the issues stated in this petition and relied on decisions of this Court noted *ante.*

The judgment of the Supreme Court of New Jersey in *Airwork* is, moreover, necessarily based on its selective interpretation of cases decided by this Court concerning state taxation of interstate commerce. The court says of Airwork's argument that the Act intends to tax only sales made within New Jersey, not services performed on goods to be delivered to customers in other states, that it

> "* * * assuredly does not attain constitutional dimensions. In *Evco* v. *Jones,* 409 U.S. 91 * * * the Court distinguished between a "tax * * * validly imposed on the service performed in the taxing State," and "a tax levied on the gross receipts from the sales of tangible personal property in another State," holding only the latter unconstitutional. Notwithstanding that the Legislature may have treated goods and services similarly for most purposes, it is entirely possible that it recognized the difference between the place where the finished product is delivered and where services upon it are rendered, in terms of subjecting services to taxation in a case such as this." 97 N.J. 290 at 293.

Evco v. *Jones,* 409 U.S. 91 (1972), wherein this Court held that a New Mexico tax on vendors measured by gross receipts, as imposed on sales of certain reproducible originals of books, etc., violated the Commerce Clause of the United States Constitution to the extent that the tax was measured by sales to purchasers out of the state, is the only case decided by this Court concerning state taxation of interstate sales which the New Jersey Supreme Court considered in deciding *Airwork.* The analysis of the New Jersey statute in the *Airwork* opinion, accordingly, consideres neither the historical and legal context in which the New Jersey Legislature acted nor the principles governing retail sales and use taxation of interstate sales established by this Court's decisions.

Whatever reasons the Supreme Court of New Jersey may have had for finding that a sound and complete record to demonstrate the viability of the constitutional issues was lacking in *Airwork,* the record herein does not permit such a finding. Petitioner was precluded under the law of the case from offering further proof that respondent's actions herein subjected the transactions at issue to risk of multiple taxation by imposition of the New Jersey retail sales tax at one end and use tax under the laws of the destination state at the other end of the interstate sale. *See ante,* pp. 12-13. Petitioner believes however, that under the decisions of this Court discussed below the facts of record herein demonstrate that respondent's actions herein were in violation of the Constitution of the United States.

Reasons for Granting the Writ

1. The judgment of the Appellate Division of the Superior Court of New Jersey affirming the judgment of the Tax Court herein decides important federal questions in a way that is in conflict with the decisions of this Court. Upon denial of petitioner's petition for certification and dismissal of its appeal herein by the Supreme Court of New Jersey the judgment of the Appellate Division is a final adjudication by the courts below. The judgment of the Supreme Court of New Jersey in *Airwork* is a final judgment of the state court of last resort which decides essentially similar questions in a way that is in conflict with decisions of this Court.

Purchasers in other states must pay, under the decisions below, a tax laid upon activities of petitioner: performance of repairs. Nexus sufficient to confer jurisdiction to exact the tax from the out-of-state purchasers is present, in the opinion of the Tax Court, because while the goods were being serviced they, as well as the property in which they were stored, enjoyed the protection and services provided

by state and local government. *Airwork,* 2 N.J. Tax 329 at 348-349.[11]

Unless one may be taxed for the activities of another, the courts below mistake the legal and economic incidence of the tax. The out-of-state purchasers perforce delivered their goods into the temporary custody of petitioner so that the repairs could be performed, but had no use of them for any purpose while they were in the state. Delivery of the goods into the temporary custody of petitioner was, then, the only activity of the purchasers that took place within the state. The measure of the tax imposed on them by New Jersey—the price paid for the repairs—had no relationship to use of the goods within the state, or to income earned by the taxpayers within the state or to the length of time that the goods remained in petitioner's custody.

Petitioner's revenues from all sources, including revenues earned by repairing products sold, are taxed under other laws enacted by the New Jersey Legislature to exact compensation for the protection and services provided by the state. The municipality in which petitioner's plant is located also taxes petitioner for the privilege of occupying land and doing business there. Under the Tax Court's construction of the retail sales tax a single class of customers—out-of-state purchasers of repair services—are subjected to another tax to pay for the protection and services provided by state and municipal government to goods temporarily in petitioner's custody and to the property in which they are stored.

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[11] The Supreme Court of New Jersey, although it expressly declined in its *Airwork* opinion to address constitutional issues, brushed aside the jurisdictional and equal protection issues implicit in Airwork's argument that the statute taxes sales made within New Jersey, not services performed on goods to be delivered to purchasers in other states, saying that the argument "* * * assuredly does not attain constitutional dimensions." 97 N.J. 290 at 293.

Purchasers within the state do not pay a tax for the protection of their goods and the property in which they are stored while they are in the temporary custody of petitioner.[12] They pay retail sales tax for the privilege of using the repaired goods in New Jersey during their entire useful life, a period during which they and their goods, unlike the out-of-state purchasers and their goods, enjoy the protection and services of state and municipal government. Yet the measure of the tax exacted from the purchaser in another state under the construction of the courts below is the same.

A purchaser must look to the state in which he uses the repaired goods for protection and services during their useful life whether he has them repaired within or out of the state of use. Therefore the state of use—the market state—imposes on the purchaser sales tax in the former and use tax in the latter case, unless under the laws of the market state the specific use is exempt. The contacts of the market state with the taxable activity and with the taxpayer so clearly predominate over those of the state of the vendor that the jurisdiction of the market state to impose retail sales and use taxes on consumption

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[12] Performance of services within the state is irrelevant to the liability of purchasers within the state for sales and use taxes under express provisions of the statute. Services subject to tax are defined as "* * * all services rendered to a person within the State, *whether or not such services are performed within the State,* upon tangible personal property the use of which is subject to tax * * *". N.J.S.A. 54:32B-2(y) (emphasis supplied). The quoted definition of services subject to tax applies to both sales and use tax. Petitioner is a "vendor" subject to sales tax collection duties under the following definition of that term:

> "A person maintaining a place of business in the State and making sales, whether at such place of business or elsewhere, to persons within the State of tangible personal property or services, the use of which is taxed by this act." N.J.S.A. 54:32B-2(i)(B).

within its borders, or to exempt certain consumption, has been unquestioned since this Court's decisions in *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937), and *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33 (1940).

Under the national system of sales and use taxation founded on these decisions the purchaser in an interstate sale pays use tax to the market state at the same rate as that which fixes the sales tax collected from his competitor within the state in an intrastate sale of like goods or services. In neither the interstate nor the intrastate sale is the purchaser taxed if the particular use intended for the goods or services is exempt under the law of the market state.[13] Every purchaser within the market state incurs liability for use tax when he engages in commerce with a vendor in another state no different from the sales tax liability he woud have incurred if he had purchased from a vendor in the market state. Precisely the same burden is borne by interstate and intrastate commerce of like character.

Only when the purchaser in an interstate sale elects to go into the vendor's state to take delivery of the goods purchased or upon which the services have been performed does he subject himself to retail sales taxation by a state other than the market state. The rule allowing the state of the vendor to impose its retail sales tax on the out-of-state purchaser under such circumstances, applied by this Court in *Utah Tax Comm'n* v. *Pacific Pipe Co.*, 372 U.S. 605 (1963), stands upon the ground that liability for an

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[13] A purchaser assessed in these proceedings, 3M Company, declined to pay the New Jersey sales tax to petitioner as collector, citing the exemption under the law of South Carolina, where the repaired equipment was delivered and used, allowed for sales of production equipment and repairs to production equipment. *See* correspondence included as "Attachment B" to Stipulation of Facts in motions for summary judgment in Tax Court.

excise tax upon sales is determined upon consummation of the sale by passage of title and delivery. In the exceptional circumstances to which the rule applies the purchaser may become liable for the use tax—a second tax on the same consumption—of the state to which he takes the goods. The risk of multiple taxation arises in these circumstances, however, as a result of the purchaser's election, not as a result of an administrative determination extending the taxing power of the seller's state to reach sales consummated by passage of title and possession out of the state.

The Tax Court put aside and out of the case the multiple tax burden which respondent's tailored tax imposes on interstate sales by treating statements of this Court concerning the possibility of imposition of a use tax by another state in the circumstances of *International Harvester Co.* v. *Dept. of Treasury*, 322 U.S. 340 (1944), as declarative of a rule applicable in the circumstances of every interstate sale. Those statements are however, carefully restricted to the circumstances of that case:

> "The Class D sales are sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to Indiana, takes delivery there and transports the goods to another State. The *Wood Preserving Corp.* case indicates that it is immaterial to the present issue that the goods are to be transported out of Indiana immediately on delivery. Moreover, both the agreement to sell and the delivery took place in Indiana. Those events would be adequate to sustain a sales tax by Indiana. In *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, we had before us a question of the constitutionality of a New York City sales tax as applied to purchasers from out-of-state sellers. The tax was "laid upon the buyer, for consumption, of tangible personal property, and

measured by the sales price." *Id.* p. 43. And it was "conditioned upon events occurring" within New York, i.e., the "transfer of title or possession of the purchased property." *Id.*, pp. 43-44. Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce.

* * *

"For example, in the *Wood Preserving Corp.* case the State to which the purchaser took the ties might also have sought to tax the transaction by levying a use tax. But we did not withhold the hand of Indiana's tax collector on that account. Nor is the problem like that of an attempted tax on the gross proceeds of an interstate sale by both the State of the buyer and the State of the seller. *Cf. Adams Mfg. Co.* v. *Storen, supra.*" 322 U.S. 340 at 345-346, 348.

As the rule of *Pacific Pipe, International Harvester,* and *Wood Preserving Corp.* is recast by the courts below, transfer of title or possession within the taxing state is no longer a condition of its power to tax, and it may lay its retail sales tax on purchasers out of the state without concern for their liability for use tax under the law of the market state because "* * * the imposition of a use tax by another state upon the same transaction does not result in multiple taxation * * *" of interstate sales. *Airwork,* 2 N.J. Tax 329 at 350. If the rule as recast by the courts below is permitted to stand, dangers warned against by Mr. Justice Rutledge, concurring in *International Har-*

vester, 322 U.S. 340, and *General Trading Co.* v. *State Tax Comm.,* 322 U.S. 335, and dissenting in *McLeod* v. *Dilworth,* 322 U.S. 327 (1944), will be realized:

> "In these interstate transactions cases involving taxation by the state of origin or that of market, the trouble arises, under the commerce clause, not from any danger that either tax taken alone, whether characterized as "sales" or "use" tax, will put interstate trade at a disadvantage which will burden unduly its competition with the local trade. So long as only one tax is applied and at the same rate as to wholly local transactions, no unduly discriminatory clog actually attaches to the interstate transaction of business.
>
> "The real danger arises most obviously when both states levy the tax. Thus, if in the instant cases it were shown that, on the one hand, Arkansas and Iowa actually were applying a "use" tax and Tennessee and Minnesota a "sales" tax, so that in each case the interstate transaction were taxed at both ends, the heavier cumulative burden thus borne by the interstate business in comparison with the local trade in either state would be obvious. If in each case the state of origin were shown to impose a sales tax of three per cent and the state of market a use tax of the same amount, interstate transactions between the two obviously would bear double the local tax burden borne by local trade in each state. This is a difference of substance, not merely one of names * * *. And the difference would be no less substantial if the taxes levied by both the state of origin and that of market were called "sales" taxes or if, indeed, both were called "use" taxes." 322 U.S. 340 at 358-359.

The real danger described by Mr. Justice Rutledge has been avoided in retail sales and use taxation of interstate

sales under the decisions of this Court by permitting the market state to tax the purchaser for the privilege of consuming or using specified goods or services within that state, while staying the hand of the vendor's state, except in the circumstances of *Pacific Pipe*.

2. What respondent and the courts below have done by their construction of the New Jersey statute a state legislature was unable to do by express statutory provision. In *Diamond Nat. Corp.* v. *State Equalization Bd.*, 425 U.S. 268 (1976) this Court reversed a decision of the highest California court holding that the incidence of the California retail sales tax was on the vendor under a statute which expressly imposed the tax on the vendor for the privilege of selling goods at retail. The California legislature, like respondent, seized upon an activity of the seller which was an incident of the sale to extend the state's taxing power. But, as this Court has said:

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from "the transportation or intercourse which is" the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce." *Nippert* v. *Richmond*, 327 U.S. 416 at 423 (1946) .

Manufacture of goods and performance of repairs to such goods by petitioner are local incidents of the interstate sales which constitute the commerce at issue. For regulatory purposes and for purposes of state jurisdiction to tax petitioner under appropriate legislation, they may be regarded as separate and distinct from the interstate sales. To treat performance by petitioner of repair services as separate and distinct from interstate sales for the purpose of gaining jurisdiction to impose a retail

sales tax on purchasers in other states is, however, to tailor the tax in a manner that results in a lack of relationship to services provided by the taxing state, as well as error in apportionment and discrimination against interstate commerce, which this Court warned against in *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 at 298-299 n.15 (1976).

The risk of multiple taxation will burden interstate sales of durable goods as well as services to those goods, since the purchaser relies on the vendor to stock the parts and furnish the services required to maintain the goods during their maximum useful life. This is particularly so in the case of equipment embodying technological knowledge or skills that are not widely available or are proprietary, such as the magnetic separation equipment returned to petitioner for repair in the transactions at issue.

In recognition of facts intrinsic to sales of services to goods the New Jersey statute, like that considered by this Court in *Berwind-White,* treats sales of tangible personal property and sales of services alike. The guiding principles are similar to those applied in *Gwin, Etc., Inc.* v. *Henneford,* 305 U.S. 434 (1939), where this Court said:

> "We need not stop to consider which, if any, of appellant's activities in carrying on its business are in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, * * * [citations omitted] and the only question is whether the taxation of appellant's gross receipts derived from them is such an interference with interstate commerce as to bring the tax within the constitutional prohibition.
>
> * * *

> "Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce in direct proportion to its volume." *Id.* at 437 438.

The sales of repair services in the transactions at issue were, in every sense material to their classification for purposes of taxation under the New Jersey retail sales tax, in aid of interstate sales of the equipment petitioner manufactures. Performance of services by petitioner in New Jersey in aid of interstate sales of its products could not, under the rule of *Gwin,* support imposition of a gross receipts tax on petitioner. Activities of petitioner within the state which would not support imposition of a tax on petitioner measured by its gross receipts from interstate sales cannot support retail sales taxes laid upon out-of-state purchasers for consumption measured by such receipts.

3. *Fisher-Stevens, Inc.* v. *Director, Division of Taxation,* 121 N.J. Super. 513 (App. Div. 1972), certif. den. 62 N.J. 575 (1973), which respondent and the courts below have treated as authority for the construction of the law announced by respondent in 1973, is not authority for imposition of retail sales tax in the transactions at issue, as the dissenting opinion of Justice Garibaldi in *Airwork* points out. *See ante,* pp. 16-17. Respondent's 1973 announcement, consequently, promulgated a rule having extra-territorial effect without color of authority under the statute, the decisions of the New Jersey courts or the decisions of this Court. Because respondent failed to comply with the notice and hearing requirements of the New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-2(e),

-4(a)(1) and (2); -4(d), his attempted rule-making was a nullity. His retroactive enforcement of the invalid rule deprived out-of-state purchasers who complied with it of property without due process of law and deprived petitioner of property without due process of law by assessing against petitioner deficiency in collection of tax which out-of-state purchasers justly refused to pay.

Disorder will arise in the national system of sales and use taxation if the decisions below are allowed to stand. Every purchaser of durable goods for consumption will incur a risk of multiple taxation each time he chooses to transact business with a vendor in another state. If New Jersey may exact revenue from out-of-state purchasers by tailoring the law to make performance of services to goods the taxable activity and impose the tailored tax retroactively, each state and each municipal taxing agency in the nation may do the same.[14]

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[14] See e.g., *Serodino* v. *Woods,* 568 SW2d 610 (Tenn. Sup. Ct. 1978) and *Parish of Jefferson* v. *Ekco-Glaco,* 280 So.2d 629 (La. App. 1973) cited by the Tax Court in *Airwork* in support of its holding that "[w]here the performance of an activity is subjected to a sales tax, the place of performance determines the place of taxation." 2 N.J. Tax 329 at 345.

CONCLUSION

The Petition for a Writ of Certiorai should be granted.

Respectfully submitted,

WILLIAM J. BIGHAM
Counsel of Record

STERNS, HERBERT & WEINROTH, P.A.
Attorneys for Petitioner, S.G. Frantz Co., Inc.
186 West State Street
P. O. Box 1298
Trenton, New Jersey 08607
(609) 392-2100

WILLIAM J. BIGHAM
Of Counsel

WILLIAM J. BIGHAM
THOMAS D. WELLINGTON
Of the New York Bar
On the Petition

Dated: March 22, 1985

APPENDIX A

Letter Opinion of the Tax Court of New Jersey (April 1, 1981)

[LETTERHEAD OF TAX COURT OF NEW JERSEY]

April 1, 1981

Thomas D. Wellington, Esquire
S. G. Frantz Company, Inc.
P.O. Box 1138
Trenton, NJ 08625

Honorable Joseph R. Zazzali
Attorney General of New Jersey
Division of Law & Public Safety
107 W. State Street
Trenton, NJ 08625

Re: *S. G. Frantz Co., Inc.* v. *Director, Div. of Taxation*
Docket No. ST 313-75 and ST 423-77
I.D. No. 1/24/80 #1(2)-2

Gentlemen:

This letter constitutes the opinion of the court in the captioned sales tax case.

Plaintiff seeks review of a determination of the defendant dated June 16, 1975 imposing an assessment of $1,319.63 (exclusive of interest) against plaintiff pursuant to the New Jersey Sales and Use Tax Act, N.J.S.A. 54:32B-1, et seq. The period covered by the assessment is August 12, 1971 to March 31, 1974. Both parties have moved for summary judgment pursuant to R. 4:46.

Appendix A

During the taxable periods in issue, plaintiff was engaged in the business of manufacturing, selling and repairing products used in the industrial processing of materials to remove or recover particles therefrom in aid of enhancing the value of the processed material or concentrating or conserving commercially valuable substances.

The broad issue in this case is the defendant's power to impose the sales tax on repair services performed by plaintiff in this State upon property delivered to plaintiff's customers at their out-of-state locations for out-of-state uses. The particular legal and factual issues are the same as those involved in *Airwork Service Division* v. *Director, Division of Taxation,* Docket No. ST 279-75, a case recently decided by this court. A copy of the court's opinion in that case is attached hereto and incorporated herein by this reference.

For the reasons stated in the *Airwork* opinion, plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted with respect to all issues except the duplicative taxation aspect of the commerce clause, with respect to which defendant's motion is denied

Defendant will prepare an appropriate order in accordance with R. 4:46-3 and submit it in compliance with R. 4:42-1 (the five-day rule).

Very truly yours,

David E. Crabtree, J.T.C.

/jcb
Enc.

cc: Honorable Lawrence L. Lasser, P.J.T.C. w/enc.
Elaine B. Goldsmith, Esquire; Clerk, Tax Court of New Jersey
w/enc.

APPENDIX B

Related Opinon of the Tax Court of New Jersey (March 27, 1981)

AIRWORK SERVICE DIVISION, A DIVISION OF PACIFIC AIRMOTIVE CORPORATION, AND A SUBSIDIARY OF PUREX CORPORATION LTD., A CALIFORIA CORPORATION,

Plaintiff,

v.

DIRECTOR, DIVISION OF TAXATION,

Defendant.*

Tax Court of New Jersey

March 27, 1981

[337] *James F. Keegan* for plaintiff (*Gerald C. Neary, James F. Keegan* and *Pitney, Hardin & Kipp,* attorneys; *William Kevin Wright* on the brief).

Harry Haushalter for defendant (*John Degnan,* Attorney General of New Jersey, attorney; *Harry Haushalter* on the brief).

CRABTREE, J. T. C.

This is a sales tax case wherein plaintiff seeks review of a "Revised Final Determination" of defendant Director

* 2 N.J. Tax 329; page of official report on which text appears is indicated by brackets.

dated December 18, 1974, imposing an assessment of $628,255.31 (exclusive of interest and penalties) against plaintiff pursuant to the New Jersey Sales and Use Tax Act, N.J.S.A. 54:32B-1 et seq. The period covered by the assessment is August 12, 1971 to June 30, 1973. Both parties have moved for summary judgment pursuant to R. 4:46.

The facts essential to disposition of the motions may be briefly stated.

From 1966 through and beyond the taxable periods in issue plaintiff has been engaged in the business of servicing and overhauling aircraft engines at its place of business in Millville, New Jersey. Upon completion of the work, which is performed entirely within this State, plaintiff ships the serviced or overhauled engines to its customers at their out-of-state locations.

The New Jersey Sales and Use Tax Act, N.J.S.A. 54:32B-1 et seq. (the act), was passed on April 27, 1966, effective with respect [338] to transactions therein specified occurring on or after July 1, 1966. L. 1966, c. 30, § 31. On or about June 28, 1966 the New Jersey Sales and Use Tax Bureau issued a press release containing 213 questions and answers concerning the act's interpretation. The release, reproduced in Report 162 of Commerce Clearing House *New Jersey Tax Reports* of July 11, 1966, included the following response to a question addressed to treatment of repair charges imposed with respect to property delivered to an out-of-state customer: "Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax."

Appendix B

On August 12, 1971 the Division of Tax Appeals promulgated its decision in the case of *Fisher-Stevens, Inc.* v. *Taxation Division,* Docket S.T. 109, holding that all sales of direct mailing services performed in New Jersey on mail to out-of-state addresses were subject to sales tax. The decision was affirmed by the Superior Court, Appellate Division. *Fisher-Stevens, Inc.* v. *Taxation Division,* 121 N.J. Super. 513, 298 A.2d 77 (App. Div. 1972), certif. den. 62 N.J. 575 (1973). In the *State Tax News,* a bi-monthly newsletter published by defendant and aimed at practitioners and large taxpayers, it was announced, in consecutive late-1973 issues, that the sales tax applied to repair services performed in New Jersey even though the serviced property was delivered outside of New Jersey for use outside of this State.

The New Jersey Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. (the APA), was enacted effective September 1, 1969. None of the rule-making provisions of the APA, including the requirement of notice and hearing before the promulgation of rules or regulations, were followed in connection with defendant's publication of the aforementioned issues of *State Tax News.*

The issues are:

1. Is compliance with the APA provisions concerning notice and hearing of proposed agency actions indispensable to the validity of a tax assessment under the Sales and Use Tax Act?

[339] 2. Did defendants' failure to comply with the notice and hearing provisions of the APA deny plaintiff due process of law?

3. Did the act, as it stood during the taxable periods in issue, authorize the imposition of a sales tax

upon repair services performed in New Jersey on property delivered outside New Jersey for use outside this State?

4. Does the imposition of a sales tax upon repair services to property destined for out-of-state delivery violate the Commerce or Equal Protection Clauses of the United States Constitution?[1]

I. The APA Issue

Plaintiff urges the invalidity of the assessment because it is based upon a rule not adopted in accordance with the APA. The "rule" which plaintiff contends was improperly adopted was the statement appearing in consecutive issues of *State Tax News* concerning defendant's interpretation of the act as applied to repair services performed in New Jersey on property destined for out-of-state shipment. The legal infirmity of defendant's action, says plaintiff, was the failure to give public notice and hearing of the *State Tax News* announcement, as required by N.J.S.A. 52:14B-4(d).

Plaintiff's argument is essentially a tightly constructed—and superficially compelling—Aristotelean syllogism whereunder plaintiff equates the *State Tax News* announcements with the APA definition of "rule" (N.J.S.A. 52:14B-

[1] While plaintiff advanced no contentions, either in its brief or in oral argument, concerning the Commerce Clause or the Equal Protection Clause, both the complaint and the pretrial order entered November 5, 1979 raise those issues and I will therefore deal with them in this opinion.

2(e)), posits the inclusion of the Division of Taxation within the definition of "state agency" (N.J.S.A. 52:14B-2 (a)), alludes to defendant's failure to comply with the notice and hearing requirements (N.J.S.A. 52:14B-4)), and then concludes that, as no rule is valid unless adopted in substantial compliance with those requirements (N.J.S.A. 52:14B-4(d)), the assessment here complained of is a nullity.

Unfortunately for plaintiff, its elegant syllogism must yield to the powers explicitly granted defendant by the taxing statute and settled judicial authority construing those powers. The defendant is authorized by § 24 of the act:

> [340] 1. To make, adopt and amend rules and regulations appropriate to the carrying out of this act and the purposes thereof;
>
> • • •
>
> and
>
> 6. To assess, determine, revise and reaadjust the taxes imposed by this act . . . [N.J.S.A. 54:32B-24(1), (6)]

Defendant's authority to assess taxes is thus independent of the requirement to adopt rules and regulations, and his assessing authority is in no way contingent upon the promulgation of rules and regulations. This conclusion is supported not only by a sensible construction of the quoted portions of § 24 of the act, but also by an imposing line of judicial authority. *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947); *R. H. Macy & Co.* v. *Taxation Division*, 77 N.J. Super. 155, 185 A.2d 682 (App. Div. 1962), aff'd o.b. 41 N.J. 3, 194 A.2d 457 (1963); *In re Heller*, 73 N.J.

292, 374 A.2d 1191 (1977). In *Chenery* the court upheld an SEC determination (disapproving a corporate reorganization plan) that was reached on an *ad hoc* basis and not by way of a formal regulation. The court stated that the absence of a general rule did not invalidate the SEC decision:

> To hold that the Commission had no alternative in this proceeding but to approve the proposed transaction, while formulating any general rules it might desire for use in future cases of this nature, would be to stultify the administrative process. That we refuse to do.
>
> • • •
>
> . . . The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future. But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. . . . Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while others must be adjusted to meet particular, unforseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity. [332 U.S. at 201-202, 67 S.Ct. at 1579-1580]

The *Chenery* principle was applied in *Macy*, a case especially apposite here since it involved tax assessments. In

that case the court acknowledged the authority of the Director of the Division [341] of Taxation to impose assessments in compliance with a statutory standard, without prior adoption of a rule or regulation,[2] saying:

> In any event, insofar as the argument before us is premised on the position that the Division of Taxation was powerless to exercise its statutory power to determine fair valuations of Macy's inventories as assets, in accordance with sound accounting principles, without *first* adopting a general rule that all department stores must report and are to be taxed on the base of Fifo inventories, the contention is without merit. First, without more evidence, we cannot say that such a rule of unvarying application in all such cases would necessarily be appropriate. Second, and more important, there is, as we have decided, an adequate legislative standard in this act for administrative guidance, and in such case the development of subsidiary rules and principles on a case-by-case basis is not proscribed. [77 N.J. Super. at 180, 185 A.2d 682]

The *Macy* decision is dispositive of the issue raised by plaintiff. The Legislature, by enacting N.J.S.A. 54:32B-3 (b)(2), has delineated the standards to be applied by defendant in determining whether a particular service is

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[2] Although the *Macy* case was decided seven years before enactment of the APA, the New Jersey Constitution provided, during the tax years at issue (1956, 1957 and 1958) that no rule or regulation of a state agency, department, officer or authority could become effective until it was filed with the Secretary of State, N.J. Const., Art. V, § IV, par. 6, a provision similar to that embodied in N.J.S.A. 52:14B-4(d), cited earlier in the text.

subject to sales tax. In light of this standard, the Director was not required to reflect his policies explicitly in the form of a regulation before imposing the assessment in question. As noted in *Macy,* such a requirement would limit defendant's capacity to assess taxes, notwithstanding the existence of adequate legislative standards.

The Legislature did not intend that the APA should impose unreasonable restraints upon the assessment of taxes by requiring that the validity of every assessment should be contingent upon the prior adoption of a regulation. Such an interpretation would require defendant to adopt regulations to meet every conceivable contingency that might arise in the context of future tax assessments, and would also jeopardize tax revenues which the Legislature directed the Division of Taxation to collect. The APA was not meant to supplant defendant's authority to assess and collect taxes, an authority explicitly grant [342] ed to him by N.J.S.A. 54:32B-24(6). Indeed, the APA expressly excludes from its coverage "agency decisions and findings in contested cases," N.J.S.A. 52:14B-2(e)(3), a category which undeniably embraces tax assessments.

Plaintiff also contends that the publication of defendant's position in the *State Tax News,* without notice to plaintiff or the public, as allegedly required by the APA, denied plaintiff due process of law. This contention is not well-founded. While it is true that a taxpayer must be given an opportunity, upon adequate notice, to challenge the validity of an assessment, due process only requires that such opportunity be afforded at some stage before a tax becomes irrevocably fixed as a charge on the taxpayer's property. *Central of Georgia R. R. Co.* v. *Wright,* 207 U.S. 127, 28 S.Ct. 47, 52 L.Ed. 134 (1907); 72 Am. Jur. 2d, State and Local Taxation, § 782. Plain-

tiff's rights to due process are vindicated in the very proceeding hence under consi ration; it has availed itself of the right to present its position in a lengthy written brief and extended oral argument thereon. Due process does not extend, however, to the alleged right of public participation by others, *Gallup* v. *Schmidt,* 183 U.S. 300, 22 S.Ct. 162, 46 L.Ed. 207 (1902), nor does it require that plaintiff be allowed to press its views as a *quasi*-legislative proceeding such as a rule-making hearing under the APA. *Williams* v. *Eggleston,* 170 U.S. 304, 18 S.Ct. 617, 42 L.Ed. 1047 (1898).

While plaintiff disavows reliance upon an estoppel theory, it appears nevertheless to argue for the application of that theory on the basis of the alleged reversal of defendant's position with respect to taxability of repair services on property destined for out-of-state delivery. Plaintiff seems to claim detrimental reliance upon defendant's earlier position, expressed in the June 28, 1966 press release, in that the sales tax was not collected from out-of-state customers prior to the reversal of defendant's position published in the late 1973 issues of *State Tax News.* The disputed assessment, of course, covers taxable periods prior to the *State Tax News* publication of defendant's position, but [343] those periods did not antedate the date of the Division of Tax Appeals decision in the *Fisher-Stevens* case (August 12, 1971).

The collection and enforcement of taxes is a strict governmental function and vitally affects the pubic interest. *State* v. *Erie Railroad Co.,* 23 N.J. Misc. 203, 42 A.2d 759 (Sup. Ct. 1945). *See East Orange* v. *Livingston,* 102 N.J. Super. 512, 522, 246 A.2d 178 (Law Div. 1968), aff'd 54 N.J. 96, 253 A.2d 546 (1969). The taxing authority is not bound or estopped by unauthorized acts of its officers,

Bayonne v. *Murphy & Perrett Co.*, 7 N.J. 298, 81 A.2d 485 (1951), nor may estoppel be invoked in cases of agency acquiescence or reversals or modifications of prior positions. *Illinois Power Co.* v. *Mahin*, 49 Ill. App. 3d 713, 7 Ill. Dec. 436, 364 N.E.2d 597 (App. Ct. 1977), aff'd 72 Ill. 2d 189, 21 Ill. Dec. 144, 381 N.E.2d 222 (Sup. Ct. 1978); *Boswell* v. *Abex Corp.*, 294 Ala. 334, 317 So.2d 317 (Sup. Ct. 1975). Moreover, a rule or regulation of a state tax commission purporting to exempt a taxpayer or a transaction from tax liability where authority to do so has not been specifically granted by the Legisature cannot operate as an estoppel to collect the tax, even in the case of transactions which have been closed so that the seller cannot collect the tax from the purchaser. *Crane Co.* v. *Arizona State Tax Comm'n*, 63 Ariz. 426, 163 P.2d 656 (Sup. Ct. 1945), overruled on other grounds *Duhame* v. *State Tax Comm'n*, 65 Ariz. 268, 179 P.2d 252 (Sup. Ct. 1947).

Of some relevance here is the long-prevalent judicial attitude in federal tax cases, where claims of estoppel against the Commissioner of Internal Revenue because of his reversal of legal positions to the alleged detriment of taxpayers, have been viewed with a jaundiced eye. The settled rule, applied uniformly to all types of taxes, is that the Commissioner of Internal Revenue is empowered retroactively to correct mistakes of law in the application of the tax laws to particular transactions, even where the taxpayer relied to his detriment on the Commissioner's mistake. *Automobile Club of Michigan* v. *Internal Revenue Comm'r*, 353 U.S. 180, 77 S.Ct. 707, 1 L.Ed.2d 746 (1957), reh. den. 353 U.S. 989, 77 S.Ct. 1279, 1 L.Ed.2d 1147 (1957); *Dixon* v. [344] *United States*, 381 U.S. 68, 85 S.Ct. 1301, 14 L.Ed. 2d 223 (1965); *Martin's Auto Trimming, Inc.* v. *Riddel*, 283 F.2d 503 (9 Cir., 1960); *Davar Products, Inc.* v.

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United States, 245 F.Supp. 460 (S.D.N.Y. 1965); 10 *Mertens, Law of Federal Income Taxation* (1974 rev.), §§ 60.14, 60.16. The rule precluding estoppel against the Commissioner of Internal Revenue is applied even where the reversed determination was originally addressed specifically to the complaining taxpayer and with respect to a particular transaction or series of transactions. *Automobile Club of Michigan* v. *Internal Revenue Comm'r, supra; Massaglia* v. *Internal Revenue Comm'r*, 286 F.2d 258 (10 Cir. 1961).

The underlying rationale is cogently stated in *Dixon* v. *United States, supra*:

> This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law. Consequently it would appear that the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due. [at 85 S.Ct. 1304]

The rule of the federal cases, resting, as it does, upon considerations of sound administration of the revenue laws, is applicable to the instant case.

As will be seen from the discussion to follow, defendant's assessment was imposed in compliance with the legislative standard embodied in N.J.S.A. 54:32B-3(b)(2) (dealing among other matters, with a sales tax on repair services to tangible personal property). That standard cannot be vitiated by an erroneous construction thereof by the Division of Taxation, not even where the taxpayer proves detrimental reliance upon such construction.

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Neither defendant nor any official responsible to him is authorized to waive state tax revenues. *Boswell* v. *Abex Corp., supra.*

II. Merits of the Assessment

Plaintiff contends that the activity which triggers application of the sales tax is delivery of the goods upon which the services have been performed, and that, delivery being outside [345] New Jersey, the act does not apply. Defendant, on the other hand, argues that the tax is imposed upon receipts from repair services performed in New Jersey, and out-of-state delivery of the property upon which the services were performed is not relevant. I conclude that defendant's position is the correct construction of the statute.

N.J.S.A. 54:32B-3 imposes a tax upon:

. . .

(b) The receipts from every sale, except for resale, of the following services:

. . .

(2) Installing tangible personal property, or maintaining, servicing, repairing tangible personal property.

. . .

The term "sale" is broadly defined to include "the rendering of any service taxable under this act, for a consideration." N.J.S.A. 54:32B-2(f). The term "receipt" is defined to include "the charge for any service taxable under this act." N.J.S.A. 54:32B-2(d).

Ascribing to the words of the statute the ordinary meaning associated with them, and considering the transactional nature of the tax, I conclude that the repair services

involved in this case are subject to the sales tax by reason of N.J.S.A. 54:32B-3(b)(2), regardless of the destination of the repaired property following completion of the services. When the performance of an activity is subjected to a sales tax, the place of performance determines the place of taxation. *Serodino, Inc.* v. *Woods,* 568 S.W. 2d 610 (Tenn. Sup. Ct. 1978); *Parish of Jefferson* v. *Ekco-Glaco,* 280 So.2d 629 (La. App. 1973).

The legislative history of the act reinforces the conclusion that the repair services in issue here are subject to sales tax. The act was drawn from the corresponding New York Sales and Compensating Use Tax Law, L. 1965, c. 93; *McKinney's Consolidated Laws of New York Annotated,* § 1101 et seq. *New Jersey Bell Tel. Co.* v. *Taxation Division,* 152 N.J. Super. 442, 378 A.2d 38 (App. Div. 1977), certif. den. 75 N.J. 594, 384 A.2d 824 (1978). The New York statute provided for imposition of the sales tax upon repair services in language substantially similar to the language [346] of N.J.S.A. 54:32B-3(b)(2). The New York law, however, expressly exempted services performed upon tangible property delivered and used outside the state. § 1115(d). The New Jersey statute included no such exemption until the 1977 amendment (to be hereinafter discussed), notwithstanding the adoption in N.J.S.A. 54:32B-8 of many of the exemptions contained in the New York law.

Where the Legislature adopts a new law, using as a source a statute theretofore enacted in another jurisdiction, but omits a provision of the source statute, the omission is construed as being deliberate. *Bank of America* v. *Webster,* 439 F.2d 691 (9 Cir. 1971); *Re Walker's Will,* 258 Wis. 65, 45 N.W.2d 94 (Sup. Ct. 1950); *Beckham* v. *Hartford Accident and Indem. Co.,* 137 So.2d 99 (La. App. 1962). Indeed, all changes in words and phrasing in a

statute adopted from another state are deemed deliberately made with the purpose of limiting, qualifying or enlarging the adopted rule. *Martin* v. *American Potash and Chemical Corp.*, 33 Del. Ch. 234, 92 A.2d 295 (1952); *Sutton* v. *Duke,* 277 N.C. 94, 176 S.E.2d 161 (Supreme Ct. 1970).

Section 3(b)(2) of the act, N.J.S.A. 54:32B-3(b)(2) was amended in 1977, L. 1977, c. 54, to exempt from sales tax the transactions in controversy here. The Statement of the Assembly Committee on Taxation appended to the bill (Assembly Bill 1787) read:

> The bill proposes to exempt from the sales tax services performed by New Jersey companies on tangible personal property delivered out of state. Because New Jersey is the only State, with the possible exception of New Mexico, that imposes a sales tax on such transactions, it places New Jersey businesses at a considerable disadvantage in maintaining such operations. *The imposition of the tax is one which did not occur in the beginning years of the sales tax but was imposed by interpretation later.* Such taxes, when assessed against New Jersey business, in many instances incur a loss because they are unable to collect from customers after the fact. [Emphasis supplied]

Plaintiff points to the italicized sentence as evidence of the Legislature's intent to exempt the transactions in issue upon enactment of the act in 1966. I cannot agree.

To begin with, the amendment itself is indicative of a change in the law. It is a well established rule of statutory [347] construction that a change of language in a statute implies a purposeful alteration in substance of the law.

Nagy v. *Ford Motor Co.*, 6 N.J. 341, 78 A.2d 709 (1951); *Cold Indian Springs Corp.* v. *Ocean Tp.*, 154 N.J. Super. 75, 380 A.2d 1178 (Law Div. 1977), aff'd 161 N.J. Super. 586, 392 A.2d 175 (App. Div. 1978), rev'd on other grounds 81 N.J. 502, 410 A.2d 652 (1980); 1A *Sutherland, Statutory Construction* (4 ed. 1972), § 22.30 at 178. Secondly, the italicized sentence in the Assembly Committee on Taxation Statement is of little probative value in ascertaining the legislative intent at the time of the act's passage in 1966. Committee reports which are made after passage of the statute to be construed are of little value, and that value decreases with the elapse of time. 2A *Sutherland,* op. cit., § 48.06 at 203. *Cf. First State Bank of Hudson Cty.* v. *United States,* 599 F.2d 558 (3 Cir., 1979), cert. den. 444 U.S. 1013, 100 S.Ct. 662, 62 L.Ed.2d 642 (1980) (subsequent Congress cannot speak for intent of earlier Congress in the enactment of a particular statute).

III. Constitutional Issues

A. Due Process and Equal Protection

Plaintiff claims a violation of the equal protection and due process provisions of the United States and New Jersey Constitutions, in that the act, as applied here, makes an irrational and arbitrary distinction between out-of-state sales of tangible personal property and services performed in New Jersey on property destined for out-of-state delivery, the former being immune from taxation while the latter is taxable.

It is, of course, well settled that a state may not constitutionally impose a sales tax upon the sale of goods de-

livered to the buyer beyond the taxing state. *McLeod* v. *Dilworth,* 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304 (1944). *Cf. J. D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365 (1938) (gross income tax on out-of-state sales held invalid). It does not necessarily follow, however, that services performed within the taxing state are likewise exempt if the serviced property is delivered beyond the state. The distinction [348] implicitly made by the Legislature is within its constitutional power and does not violate the Equal Protection Clause, since there is a presumptively rational basis for the distinction. *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959). States are given "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351 (1973). A strong presumption of constitutionality attends the legislative classification, *id.* at 364, 93 S.Ct. at 1006, and the party challenging it must negate "every conceivable" basis for the statute, since the statute must be upheld if any state of facts can be reasonably conceived to sustain it. *Allied Stores of Ohio, Inc.* v. *Bowers, supra* 358 U.S. at 528, 79 S.Ct. at 441; *Robbiani* v. *Burke,* 77 N.J. 383, 391-392, 390 A.2d 1149 (1978); *Taxpayers Ass'n of Weymouth Tp., Inc.* v. *Weymouth Tp.,* 80 N.J. 6, 39-40, 364 A.2d 1016 (1976).

In the present case there is no basis for plaintiff's allegation of an irrational, arbitrary classification by the legislature. The imposition of the sales tax upon all repair services performed in New Jersey is eminently rational as the State's connection with the rendition of the service is exactly the same whether or not the property is delivered beyond the State.

So much for plaintiff's equal protection contention. Plaintiff's due process allegation may be dispatched even more summarily.

The due process requirement is satisfied if there is some nexus, however minimal, between the activity to be taxed and the taxing state. *Wisconsin* v. *J. C. Penney,* 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267 (1940); *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954). The protection afforded by the state requires that the activity bear a just share of the cost of state government. *Western Live Stock* v. *Revenue Bureau,* 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938). The aircraft engines were serviced and overhauled by plaintiff entirely within New Jersey and those engines, as well as the [349] property in which they were stored, enjoyed the protection and services provided by state and local government so long as they remained here.

Plaintiff's equal protection and due process challenges are without merit.

B. The Commerce Clause

Plaintiff alleges a violation of the Commerce Clause of the United States Constitution, Article I, § 8, in that the act, as applied here, unlawfully subjects interstate transactions to an unapportioned direct tax.

State taxation of interstate transactions does not violate the Commerce Clause if it operates to exact "from interstate commerce its fair share of the cost of state government." *Washington Dept. of Revenue* v. *Association of Washington Stevedoring Co's.,* 435 U.S. 734, 748, 98 S.Ct. 1388, 1398, 55 L.Ed2d 682 (1978). The mere fact that,

as in the present case, the transactions are the products of contracts between residents of different states, does not immunize the transactions from state or local taxation. *Western Live Stock* v. *Revenue Bureau, supra.* The fact that property which is the subject of the transaction is immediately transported out of the taxing state does not change the result. *State Tax Comm'n* v. *Pacific Cast Iron Pipe Co.,* 372 U.S. 605, 83 S.Ct. 925, 10 L.Ed2d 8 (1963).

In *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the Supreme Court ruled that a state tax is not an unconstitutional burden upon interstate commerce if (1) there is a sufficient nexus with the state to justify the tax, (2) the tax is fairly related to the benefits provided by the state to the taxpayer, (3) the tax does not discriminate against interstate commerce and (4) the tax is fairly apportioned to local activities. The act, as applied to the transactions here in issue, meets three of these four tests.

The first two tests are covered in the foregoing discussion of plaintiff's equal protection and due process claims. The [350] third test (nondiscriminatory treatment of interstate transactions) is satisfied if the tax places the same burden upon intrastate commerce. *McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565 (1940). In this case the act applies to *all* receipts from repair services performed within New Jersey, regardless of whether the purchaser is a resident or non-resident and irrespective of the destination of the serviced property.

The fourth test (fair apportionment to local activities) is intended to avoid multiple taxation of the same trans-

action by two or more states. The vice to be avoided in the case of transactional taxes (such as sales or gross receipts taxes) is the potential that each state touched by the transaction has an equal right to impose a tax, so that, without protection of the Commerce Clause, the commerce would bear cumulative burdens not imposed upon local commerce. *General Motors Corp.* v. *Washington,* 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964); *Western Live Stock* v. *Revenue Bureau, supra; J. D. Adams Mfg. Co.* v. *Storen, supra.* The taxpayer, however, has the burden of proving *actual* multiple taxation. *Standard Pressed Steel* v. *Revenue Dep't,* 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719 (1975); *General Motors Corp.* v. *Washington, supra.* A finding of duplicative taxes may not rest on speculative grounds. *Moorman Mfg. Company* v. *Bair,* 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197 (1978). The fair apportionment test is satisfied if it appears that no other state could justifiably tax the transaction in question. *Fisher-Stevens, Inc.* v. *Taxation Division,* 121 N.J. Super. 513, 298 A.2d 77 (App. Div. 1972), certif. den. 62 N.J. 575, 303 A.2d 328 (1973); *Corning Laboratories, Inc.* v. *Iowa State Revenue Dep't,* 270 N.W.2d 463 (Iowa Sup. Ct. 1978). Moreover, the imposition of a use tax by another state upon the same transaction does not result in multiple taxation in derogation of the fair apportionment test. *International Harvester* v. *Treasury Dep't,* 322 U.S. 340, 64 S.Ct. 1019, 88 L.Ed. 1313 (1944); *Treasury Dep't* v. *Wood Preserving Corp.,* 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188 (1941).

[351] Conceivably, the states of destination of the overhauled or serviced aircraft engines impose sales, as distinguished from use taxes, on the purchasers of plaintiff's services on the basis that delivery, not performance of services, is the taxable event. Alternatively, these states—or some of

them—might impose a sales tax on the repair parts used by plaintiff in its work on the aircraft engines. (The affidavit of plaintiff's vice-president and general manager indicates that, typically, up to 80% of plaintiff's charges are attributable to the cost of parts used in overhauls.) *See State* v. *Communication Equip. & Contr. Co., Inc.,* 335 So.2d 123 (Ala. App. 1976). Thus, there remains the possibility of actual duplicative taxation.

IV. Conclusion

The Administrative Procedure Act is inapplicable to the actions taken by defendant with respect to its publications in *State Tax News* and the disputed assessments of sales tax. Defendant's power to make assessments pursuant to the Sales and Use Tax Act is not contingent upon prior adoption of a rule attended by notice and public hearing.

Moreover, defendant's failure to comply with the notice and hearing requirements of the APA with respect to rule-making did not deprive plaintiff of due process, nor did its alleged detrimental reliance upon defendant's earlier position that the disputed transactions were nontaxable estop defendant from assessing and collecting the tax.

Both a sensible construction of the act and the legislative history thereof compel the conclusion that repair services performed within the State upon tangible personal property are subject to sales tax, regardless of the destination of the repaired property following completion of the services.

The aforementioned interpretation of the act violates neither the Due Process Clause nor the Equal Protection Clause of the New Jersey and United States Constitutions.

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The act may be violative of the Commerce Clause of the United States Constitution upon a showing of actual duplicative taxation. As this issue was not covered by the summary judg [352] ment motions, there remains an issue of material fact to be resolved at a trial. R. 4:46-2. The parties will be given an opportunity to submit proofs on this issue alone. Those proofs will be directed to the identification of the states to which the serviced aircraft engines were delivered, the nature and quantum of the taxes imposed by statutes of those states upon the transactions in issue here whether any such taxes were actually assessed, the extent of actual collection of such taxes, the applicable statutes of limitation upon assessment and collection of any such allegedly duplicative taxes (where those taxes are claimed to be due but remain unassessed or uncollected), and such other evidence as the parties deem germane to the issue of duplicative or multiple taxation. As stated earlier in this opinion, however, plantiff bears the burden of proof with respect to such issue.

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted with respect to all issues except the duplicative taxation aspect of the Commerce Clause issue, with respect to which defendant's motion is denied.

APPENDIX C

Related Opinion of the Superior Court of New Jersey, Appellate Division

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AIRWORK SERVICE DIVISION, A DIVISION OF PACIFIC AIRMOTIVE CORPORATION, A CALIFORNIA CORPORATION, AND A SUBDIVISION OF PUREX CORPORATION LTD., A CALIFORNIA CORPORATION,

Plaintiff-Appellant,

v.

DIRECTOR, DIVISION OF TAXATION,

Defendant-Respondent.

Superior Court of New Jersey

Appellate Division

Argued March 15, 1982—Decided April 28, 1982

Before Judges Milmed, Joelson and Gaulkin.

Gerald C. Neary argued the cause for appellant (Pitney, Hardin, Kipp & Szuch, attorneys).

Harry Haushalter, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James

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R. Zazzali, former Attorney General of New Jersey, Erminie L. Conley, former Assistant Attorney General, and Harry Haushalter, on the brief.)

PER CURIAM.

The order and judgment under review are affirmed substantially for the reasons expressed by Judge Crabtree in his written opinion for the Tax Court of March 27, 1981, 2 N.J. Tax 329 and in light of the determination of the plaintiff-appellant to forego the opportunity to submit proofs on the issue of "duplicative taxation" referred to therein.

Additionally, we need give no consideration here to plaintiff's contention, raised for the first time on this appeal, that "[e]ven if valid, the assessment should extend only to the cost of labor, not to the cost of parts." The Attorney General, in his brief on behalf of defendant-respondent Director of the Division of Taxation, notes that

> . . . This issue was neither raised in the petition of appeal [to the former Division of Tax Appeals] nor incorporated as an issue in the pretrial order [of the Tax Court], nor raised or argued in the cross-motions for summary judgment, nor considered by the trial court in its opinion. The defendant has never been accorded an opportunity to address this issue at the trial court level and, therefore, has never had the opportunity to rebut the plaintiff's allegation that a significant portion of the receipts are non-taxable because they related to the sale of parts.
>
> This issue, which is clearly raised as an afterthought at this late date, requires a thorough fac-

> tual analysis as to the nature of the parts involved, the extent to which such parts were previously repaired or restored by Airwork in New Jersey, the manner in which Airwork acquired such parts, the condition such parts were in at the time of acquisition and the relative value of Airwork's skill in using such parts to repair complex machinery . . .

The Attorney General properly concludes that:

> . . . Airwork was clearly required to timely-raise below the issue as to the sale of parts and, thereby, allow for the compilation of a full factual record on this question. Having failed to raise this issue below, Airwork is now precluded from raising this issue on appeal.

See *State* v. *Souss*, 65 N.J. 453, 460, 323 A.2d 484 (1974); *Nieder* v. *Royal Indemnity Insurance Co.*, 62 N.J. 229, 234, 300 A.2d 142 (1973).

Affirmed.

APPENDIX D

Motion for Direct Certification

SUPREME COURT OF NEW JERSEY
M-793 September Term 1983

21,143

(Filed: May 4, 1983)

S.G. FRANTZ COMPANY, INC.,

Plaintiff-Movant,

v.

DIRECTOR, DIVISION OF TAXATION,

Defendant-Respondent.

This matter having been duly presented to the Court, it is ORDERED that the motion for direct certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 29th day of April, 1983.

STEPHEN W. TOWNSEND
Clerk

APPENDIX E

***Per Curiam* Opinion of the Superior Court of New Jersey, Appellate Division**

(Filed: May 31, 1983)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-1483-81T3

S.G. FRANTZ CO., INC.,

Plaintiff-Appellant,

v.

DIRECTOR, DIVISION OF TAXATION,

Defendant-Respondent.

Submitted May 2, 1983—Decided May 31, 1983

Before Judges Milmed and Morton I. Greenberg

On appeal from the Tax Court of New Jersey.

Sterns, Herbert & Weinroth, attorneys for plaintiff-appellant (William J. Bigham with Thomas D. Wellington of the New York Bar, of counsel and on the briefs).

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Irwin I. Kimmelman, Attorney General of New Jersey, attorney for defendant-respondent (James J. Ciancia, Assistant Attorney General, of counsel; Harry Haushalter, Deputy Attorney General, on the brief).

PER CURIAM

The orders and judgments under review are affirmed substantially for the reasons expressed by Judge Crabtree in his April 1, 1981 opinion for the Tax Court in this matter and his March 27, 1981 opinion for the Tax Court in *Airwork Service Division* v. *Director, Division of Taxation,* 2 N.J. Tax 329 (1981), incorporated in the April 1, 1981 opinion by reference,[1] and in light of the determination of plaintiff-appellant to forego the opportunity to submit proofs on the issue of "duplicative taxation" referred to therein.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

Elizabeth McLaughlin
Clerk

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[1] The opinion of this Court affirming the order and judgment under review in *Airwork* is reported at 4 N.J. Tax 532 (App. Div. 1982). Certification was granted by the Supreme Court in that case on January 10, 1983.

APPENDIX F

Related Opinion of the Supreme Court of New Jersey

AIRWORK SERVICE DIVISION, A DIVISION OF PACIFIC AIRMOTIVE CORPORATION, A CALIFORNIA CORPORATION, AND A SUBDIVISION OF PUREX CORPORATION LTD., A CALIFORNIA CORPORATION,

Plaintiff-Appellant,

v.

DIRECTOR, DIVISION OF TAXATION,

Defendant-Respondent.*

Argued November 7, 1983—Decided July 23, 1984

[291] Gerald C. Neary, argued the cause for appellant (Pitney, Hardin, Kipp & Szuch, attorneys; Gerald C. Neary and Jeri E. Ruscoll, on the briefs).

Harry Haushalter, Deputy Attorney General, argued the cause for respondent (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General of counsel).

John W. Boyd, a member of the New Mexico bar, argued the cause for *amicus curiae* Consumer Bureau, Inc. (Pollan and Pollan, attorneys; Steven E. Pollan, of counsel and on the brief).

* 97 N.J. 290; page of official report on which text appears is indicated by brackets.

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[292] Robert A. Goodsell submitted a brief on behalf of *amicus curiae* American Civil Liberties Union of New Jersey (Irwin, Post & Rosen, attorneys).

The opinion of the Court was delivered by
HANDLER, J.

Plaintiff, Airwork Service Division (Airwork or taxpayer) is in the business of repairing airplane engines. All repairs are made at Airwork's facilities in New Jersey, and the repaired engines are then returned to customers, generally out of state. Defendant, Director, Division of Taxation (Director) notified Airwork in September 1973 of its intention to assess it for sales tax on services rendered between July 1, 1970 and June 30, 1973, under the New Jersey Sales and Use Tax Act, N.J.S.A. 54:32B-1 to -29 (Act). Airwork filed an appeal of the assessment with the Division of Tax Appeals in 1975, which was later heard by the Tax Court on cross-motions for summary judgment. The Tax Court held the assessment valid, granting the Director partial summary judgment. 2 N.J. Tax 329 (1981). Airwork appealed and the Appellate Division affirmed. We granted the taxpayer's petition for certification. 93 N. J. 246 (1983).

I

The question that we first address is whether the underlying transactions are subject to the sales tax under the terms of the Act.

N.J.S.A. 54:32B-3 imposes a sales tax on the sale of tangible personal property and on the performance of certain services. N.J.S.A. 54:32B-2(f). The repair of airplane engines is a service covered by the Act. N.J.S.A.

54:32B-8.35. The taxpayer stresses, however, that while the repair services on these airplanes are rendered in New Jersey, the engines are later returned to out-of-state customers. It is contended that because the sale occurs at the place of delivery, the services [293] should be deemed to have been sold or completed at the site to which the returned property is delivered. The taxpayer points to provisions of the Act that treat the sale of goods and services equivalently, *e.g.,* N.J.S.A. 54:32B-2(i) (defining "vendor"). Because the Act intends to tax only sales made within New Jersey, the argument continues, the Legislature cannot have intended to tax services performed on goods to be delivered to customers in other states.

This argument is not persuasive. It assuredly does not attain constitutional dimensions. In *Evco* v. *Jones,* 409 U. S. 91, 93, 93 S. Ct. 349, 350, 34 L. Ed. 2d 325, 328 (1972), the Court distinguished between a "tax * * * validly imposed on the service performed in the taxing State," and "a tax levied on the gross receipts from the sales of tangible personal property in another State," holding only the latter unconstitutional. Notwithstanding that the Legislature may have treated goods and services similarly for most purposes, it is entirely possible that it recognized the difference between the place where the finished product is delivered and where services upon it are rendered, in terms of subjecting services to taxation in a case such as this. *See Fisher-Stevens, Inc.* v. *Director, Div. of Taxation,* 121 N. J . Super. 513 (App. Div. 1972), certif. den., 62 N. J . 575 (1973).

The critical issue is whether the Legislature intended to tax services such as those performed by Airwork. In looking first to the statutory language as such, we are

struck by the fact that the services performed in New Jersey on goods delivered out of state are not specifically exempted from the application of the Act. N.J.S.A. 54: 32B-3(b)(2). We have recently acknowledged, in a somewhat variant context, that such exemptions, if they are present, must be narrowly and strictly construed and, if not clearly applicable, the underlying transaction must be amenable to the tax. *See Metpath* v. *Director, Div. of Taxation,* 96 N. J. 147 (1984) (provision of Act exempting from tax all catalysts "that do not become a component part of finished product" is limited to chemicals used to produce tangi [294] ble personal property); *Tuscan Dairy Farms, Inc.* v. *Director, Div. of Taxation,* 4 N. J. Tax 92 (1982).

The Tax Court here determined that the Act's failure to include an exemption from the sales tax of services to property delivered out of state was purposeful. 2 N. J. Tax at 345. Such an exemption was expressly contained in the New York Sales and Compensating Use Tax Laws, § 1101 *et seq.* (McKinney 1979), which served as a model to the New Jersey Act. "Where the Legislature adopts a new law, using as a source a statute theretofore enacted in another jurisdiction, but omits a provision of the source statute, the omission is construed as being deliberate." 2 N. J. Tax at 346. Clearly, the rendition of services in conjunction with the delivery of products out of state is not uncommon. *E.g., Fisher-Stevens, Inc., supra,* 121 N. J. Super. 513. Accordingly, we adopt the Tax Court's conclusion that the Legislature purposefully chose not to exempt these services. *See Evco* v. *Jones, supra,* 409 U. S. 91, 93 S. Ct. 349, 34 L. Ed. 2d 325; *see also Bank of America* v. *Webster,* 439 F. 2d 691 (9th Cir. 1971).

The taxpayer, however, points to historical circumstance to support its contention. The Act was passed in 1966 to be effective July 1 of that year. On June 28, 1966 the

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Sales and Use Tax Bureau of the Division of Taxation issued a press release, containing questions and answers about the Act, that was published on July 11, 1966, in a commercial tax news service—Report 162 of the Commerce Clearing House *New Jersey Tax Reports.* The press release included the following statement:

> Charges for repairs where the articles upon which the work is performed are delivered, upon completion, pursuant to contract, to a purchaser outside the State for use outside the State are exempt from the sales tax.

Airwork claims that this published statement is equated with an official policy adopted by the Division of Taxation. Nevertheless, the issue of the taxability of services performed for out-of-state customers was being actively litigated. It was—or should have been—well known to similarly situated taxpayers [295] that the Division of Taxation was vigorously taking the position that such services were taxable. The issue was finally resolved in 1972 by the decision of the Appellate Division in *Fisher-Stevens, Inc., supra,* 121 N. J. Super. 513, affirming the 1971 determination of the Division of Tax Appeals, Docket S. T. 109, which held that a company providing direct mailing services in New Jersey with materials sent chiefly to addresses in other states on behalf of out-of-state customers was subject to the sales tax for the services performed in New Jersey.

The taxpayer further notes that following the enactment of the statute, the Legislature failed to object to the Division's "position," ostensibly appearing in the 1966 press release. Airwork draws the conclusion that the Division's policy therefore met with legislative approval and

conformed to the Legislature's intent. In general, the legislative attitude towards enacted legislation is a marginal tool of interpretation, even under the most propitious circumstances. 2A *Sutherland, Statutory Construction* § 48.06 (4th ed. 1972). The generally limited usefulness of coupling administrative practice with legislative inaction to extrapolate legislative intent is further reduced when the agency attitude itself is unofficial and equivocal. As the Division points out, the earlier press release was never officially approved or even authenticated as an official pronouncement. Further, to the extent there were any officially endorsed statements on this subject matter, these were set forth in the general instructions accompanying the official tax returns. The instructions did not authorize or permit the exclusion of services performed on goods delivered outside New Jersey. Moreover, following its successful litigation of the issue in 1972, the Division affirmatively sought to dispel the possible confusion generated by the earlier press release by specifically stating, in two separate issues of *State Tax News,* a bi-monthly newsletter published by the Division itself, that the sales tax did apply to repair services performed in New Jersey, regardless of where the repaired property was to be delivered.

[296] We note that courts have acknowledged that "the practical administrative construction of a statute over a period of years without interference by the Legislature is evidence of its conformity with the legislative intent and should be given great weight by the courts." *Automatic Merchandising Council* v. *Glaser,* 127 N. J. Super. 413, 420 (App. Div. 1974) (interpreting Sales and Use Tax Act); *see Malone* v. *Fender,* 80 N. J. 129 (1979). Nevertheless, the court will consider this factor only when it is not satis-

fied that the Legislature's intent cannot otherwise be determined by a critical examination of the purposes, policies, and language of the enactment. When such circumstances point strongly to the imputation of a particular legislative intent, they may not be outweighed or overcome simply by a countervailing administrative practice. *See Fedders Corp.* v. *Director, Div. of Taxation,* 96 N. J. 376 (1984) (language, purpose, and policy of "indebtedness" clause in New Jersey Corporation Business Tax Act evidenced legislative intent to exclude *bona fide* debt owed to affiliated corporation, notwithstanding contrary administrative interpretation that was itself confirmed by administrative rule and longstanding, uniform agency practice); *Mobay Corp.* v. *Director, Div. of Taxation,* 96 N. J. 407 (1984) (same).

We conclude, therefore, that the Act authorizes the imposition of a sales tax on the performance of services rendered in the state on goods to be delivered to customers outside the State.

II

The Division made no attempt to collect taxes on taxpayer's repair work during the early years of the sales tax, despite its having audited plaintiff's books during the summer of 1967. Because the taxpayer assertedly relied on the Division's previous position, it argues that the tax assessment against it is improper.

[297] This argument is analogous to one based on principles of equitable estoppel. In *New Jersey Turnpike Auth.* v. *Washington Tp.,* 137 N. J. Super. 543, 552 (App. Div. 1975), aff'd o.b., 73 N. J. 180 (1977), the court remarked that "the application of principles of estoppel [is] par-

ticularly inappropriate where the collection of taxes by a public body is involved, except in unusual circumstances." *See also Bayonne* v. *Murphy & Perrett Co.*, 7 N. J. 298 (1951) (taxing authority is not bound or estopped by unauthorized acts of its officers). In *Skulski* v. *Nolan*, 68 N. J. 179, 198 (1975), this Court recognized that "the concept of estoppel is not applied as readily against the public as against private persons." *Id.; see Zigmont* v. *Bd. of Trustees, Teachers' Pension & Annuity Fund*, 91 N. J. 580 (1983). The issue thus becomes whether the circumstances of this case warrant the unusual remedy of estopping the government from collecting taxes because the taxpayer has assertedly relied on earlier statements by the taxing authority.

A number of cases in other jurisdictions have refused to allow an estoppel against a taxing authority. *E.g., Crane Co.* v. *Arizona State Tax Comm'n*, 63 Ariz. 426, 163 P. 2d 656 (1945), overruled on other grounds sub. nom. *Duhame* v. *State Tax Comm'n*, 65 Ariz. 268, 179 P. 2d 252 (1947); *Market Street Ry. Co.* v. *California State Bd. of Equalization*, 137 Cal. App. 2d 87, 290 P. 2d 20 (Dist. Ct. App. 1955); *La Societe Francaise* v. *California Employment Comm.*, 56 Cal. App. 2d 534, 133 P. 2d 47 (Dist. Ct. App. 1943). The application of this equitable doctrine is extremely fact-sensitive. The Division stresses that Airwork has not demonstrated actual or reasonable reliance on any definitive official conduct on the part of the Division. As noted, no express exemption is provided by the Act itself. The press release, published in a private, commercial tax news service, was not shown to be an official statement or pronouncement. In addition, according to the Division, that release contained inaccuracies and outdated information, suggesting a lack of reliability. *See Iowa Movers & Warehousemen's Ass'n* v. *Briggs*, 237 N. W. 2d 759 (Iowa

1976) (taxing authority [298] not estopped from imposing tax contrary to past enforcement policy when taxpayer failed to prove actual reliance); *see also Dixon* v. *United States,* 381 U. S. 68, 72-73, 85 S. Ct. 1301, 1304-1305, 14 L. Ed. 2d 223, 227 (1965) (Commissioner may retroactively correct mistakes of law in application of tax laws to particular transactions, even where taxpayer may have relied to his detriment on past practice). Also, the Division, in active litigation, asserted the taxability of such transaction. *Fisher-Stevens, Inc., supra,* 121 N. J. Super. 513. Moreover, the official instructions accompanying the sales tax returns did not mention or recognize any exemption for services provided out-of-state customers.

Both Airwork and *amicus* Consumer Bureau, Inc., rely on cases from other jurisdictions in which courts have not permitted taxing authorities to change or modify their position. However, many of these cases involve the power to apply new regulations retroactively, *see, e.g., Illinois Bell Tel. Co.* v. *Allphin,* 95 Ill. App. 3d 115, 50 Ill. Dec. 739, 419 N. E. 2d 1188 (1981); *Appeal of Denman,* 120 N. H. 568, 419 A. 2d 1084 (1980); *Department of Revenue* v. *Family Hosp., Inc.,* 105 Wis. 2d 250, 313 N. W. 2d 828 (1982); *Hercules Powder Co.* v. *State Bd. of Equalization,* 66 Wyo. 268, 208 P. 2d 1096 (1949), reh'g denied, 66 Wyo. 309, 210 P. 2d 824 (1948). The instant case appears to involve the converse situation, namely, the application of the controverted tax to cover previous tax years is in accord with the enabling tax statute, consistent state fiscal concerns, and legislative policy.

The Legislature presumably has been long aware of the issues implicated in the taxability of services performed for out-of-state customers. In 1974, the Legislature passed A. 1628, designed to exempt from taxation repair work on

tangible property delivered to out-of-state customers. This bill was vetoed by the Governor, whose veto message explained:

> I strongly believe that such an amendment would represent a substantial and excellent step forward in reforming the present business tax structure that now plagues the economy of this State. However, I cannot overlook the fact that [299] enactment of such an amendment may result in the loss of approximately $5 million in tax revenue for the State. During this time of fiscal crisis, it would be irresponsible for me to allow such an amendment to become law without having the ability to recoup the loss through another revenue raising device.

A similar bill was finally enacted in 1977. L. 1977, c. 54, N.J.S.A. 54:32B-3(b)(5) (as amended). The committee statements accompanying both bills reflect legislative disapproval of a tax on such services, as it would impose hardship on New Jersey businesses, some of which may have relied on the Division's earlier failure to impose the tax. It is more significant, however, that in enacting L. 1977, c. 54, the Legislature itself did not choose to apply the statutory exemption retroactively. Further, the Governor's veto in 1974 of previous legislation reinforces the policy that a retroactive recognition of the exemption for such services would be contrary to public policy.

Other states have announced a *per se* rule against estopping the government from collecting taxes. *See, e.g., State* v. *Maddox Tractor & Equip. Co.,* 260 Ala. 136, 69 So. 2d 426 (1953); *Claiborne Sales Co., Inc.* v. *Collector of Revenue,* 233 La. 1061, 99 So. 2d 345 (1957); *Henderson* v. *Gill,* 229 N. C. 313, 49 S. E. 2d 754 (1948) (in collection of sales

tax, error of an administrator should not serve to redistribute tax burden as imposed by the Legislature). We conclude, under the circumstances of this case, that when a sales tax statute specifically provides for the taxation of particular transactions and does not explicitly provide for the tax exemption of such transactions, estoppel should not generally be available to a subject taxpayer. The strong public and governmental interest in the collection of the tax imposed by the Legislature will usually outweigh the asserted reliance by a taxpayer, especially when such reliance is claimed to be based on unofficial statements and equivocal administrative inaction.

In summary, we hold that principles of equitable estoppel or similar considerations do not prevent the collection of the sales taxes against the taxpayer as determined by the Director.

III

[300] Airwork argues that before changing its position, the Division was obliged to follow the procedures of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15, governing the promulgation of administrative rules. The Tax Court concluded, however, that the Division's tax assessment did not constitute rule-making and therefore was not subject to the APA. 2 *N. J. Tax* at 340-41. While N.J.S.A. 54:32B-24(1) gives the Division the power to make rules, the Director, under N.J.S.A. 54:32B-24(6), has the power "[t]o assess, determine, revise and readjust the taxes imposed by this act." The Tax Court held that in assessing the tax against Airwork, the Division was acting pursuant to this power. The Appellate Division affirmed the Tax Court. We agree.

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N.J.S.A. 52:14B-2(e) defines an administrative agency "rule" as follows:

> "Administrative rule" or "rule," when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intraagency and interagency statements; and (3) agency decisions and findings in contested cases.

If an agency determination or action constitutes an "administrative rule," then its validity requires compliance with the specific procedures of the APA that control the promulgation of rules. *Metromedia* v. *Director, Div. of Taxation*, 97 N. J. 313 (1984).

We have considered the question of when a determination of the Division of Taxation imposing a tax assessment can appropriately be found to implicate agency rule-making, thereby necessitating conformity with the APA. We stated in *Metromedia* v. *Director, Div. of Taxation*, decided today:

> [A]n an agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a [301] large

segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency action must be rendered through the rule-making or adjudication.

[96 N. J. at 331.]

In this case, applying the *Metromedia* standards, we are satisfied that the Director's assessment was not invalid for want of an authorizing rule or regulation. Here, the taxabiltiy of these services is sufficiently clearly and directly inferable from the tax statute itself, especially in the absence of a specific exemption. See discussion, *supra,* at 320-323. Further, it has not been demonstrated that the determination represents a material and significant change in administrative policy, even though for several years the taxing authority did not impose the tax. Past policy was itself equivocal, was not officially endorsed, and was not definitively settled. Further, it seems clear that the

agency action properly applies retroactively to this particular case and could be applied to similarly situated taxpayers. Finally, the broad fact-finding and informational procedures typical of rule making are not warranted in this case in order to buttress the soundness of the determination or to assure fairness to individual litigants. In terms of the actual assessment, Airwork had every opportunity to challenge with countervailing proofs the application of the tax. Each taxpayer to whom the tax is sought to be imposed will similarly be free to contest the application of the tax to its operations. Accordingly, we conclude that the Director had the authority in this case to proceed by way of adjudication.

IV

[302] We acknowledge that constitutional issues have been asserted at various stages of this litigation, some by the taxpayer and some by *amicus*. These issues were not determined by the courts below. We note these issues, but in the absence of their consideration by the lower courts, and without a sound and complete record to demonstrate their viability, decline to address them.[1] The taxpayer also argues that the assessment applies only to the cost of labor, not to the cost of parts. This issue, however, was raised for the first time on appeal, and the Appellate Divi-

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[1] The taxpayer asserts that goods sold and delivered to out-of-state customers are immune from taxation under the federal Commerce Clause. It also makes an equal protection argument along these lines, questioning the rationality of such a distinction. *Amicus* American Civil Liberties Union of New Jersey argues that the retroactive imposition of the sales tax violates plaintiff's constitutional right to substantive due process under both federal and State constitutions.

sion declined to consider it. We similarly decline to deal with this issue, recognizing that the taxpayer may pursue this as well as its constitutional claims before an appropriate tribunal if it chooses to do so.

In conclusion, we hold that the tax assessment imposed on the taxpayer in this case is in accordance with the terms of the Act; it was permissibly imposed on transactions for the years involved; and it does not in the circumstances presented constitute invalid rule-making.

Accordingly, the judgment below is affirmed.

GARIBALDI, J., dissenting.

> It is the part of a good shepherd to shear the flock, not flay it. [Tiberius Caesar, A.D. 25.]

Justice Frankfurter once noted that "[e]ven tax administration does not as a matter of principle preclude considerations of fairness." *Angelus Milling Co.* v. *Comm'r of Internal Revenue,* 325 U. S. 293, 297, 65 S. Ct. 1162, 1165, 89 L. Ed. 1619, 1623 (1945). Today's decision loses sight of the need for fairness. It [303] allows the Division of Taxation (Division), long after the transactions in question were closed, to extract from Airwork Service Division (Airwork) sales taxes that the Division itself informed Airwork it should refrain from collecting from its out-of-state customers. The Division has been able to accomplish this apparently draconian result by successfully arguing that Airwork should never have relied on its information in the first place.

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Given the prior published position of the Division, Airwork's understandable reliance on that announced position, the nature of the sales tax, and Airwork's current inability to collect the sales taxes, the retroactive imposition of the sales tax produces such a harsh result that it offends fundamental concepts of fairness relating to agency conduct. I believe that an agency may not reverse itself retroactively when doing so will cause extraordinary detriment to those who have relied in good faith on the agency's prior position. Further, as the imposition of sales tax here allows the state to revise its earlier publicized position without first providing a taxpayer with notice of the change, it violates the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15, governing the promulgation of administrative rules. Hence, I disagree with the majority, and would hold the sales-tax assessment invalid.

I

Administrative agencies need flexibility to exercise their executive role through rulemaking and adjudication so that they may effectuate public policy. *See In re Kallen,* 92 N. J. 14, 24-25 (1983). As a result, they have great discretion in selecting the form of proceeding best suited to achieving their aims. *See In re Uniform Admin. Procedure Rules,* 90 N. J. 85, 92 (1982); *Texter* v. *Department of Human Servs.,* 88 N. J. 376, 383-84 (1982); *Bally Mfg. Corp.* v. *New Jersey Casino Control Comm'n,* 85 N. J. 325, 338 (1981) (Handler, J., concurring).

[304] This discretion is not unlimited, however. This Court has not hesitated to apply principles of fundamental fairness, beyond those required by the Constitution, to ad-

ministrative agency actions. *See In re Arndt*, 67 N. J. 432 (1975); *Monks* v. *New Jersey State Parole Bd.*, 58 N. J. 238 (1971); *cf. State* v. *Tropea*, 78 N. J. 309, 315-16 (1978) (although retrial of charge of speeding was not barred by Constitution, "considerations of fundamental fairness" militated against retrial when it would merely afford the State another opportunity to produce evidence of the applicable speed limit that the State had failed to produce originally); *Rodriguez* v. *Rosenblatt*, 58 N. J. 281, 294-95 (1971) ("considerations of fairness" dictated that counsel be provided to indigents charged in municipal courts with disorderly persons or other petty offenses). "When specific parties are particularly affected by a proposed rule, fair play and administrative due process dictate that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and genuinely account for the individualized effect of its proposed action." *Bally Mfg. Corp.* v. *N. J. Casino Control Comm'n, supra*, 85 N. J. at 345 (Handler, J. concurring).

"[T]here are no simple answers as to what constitutes fundamental fairness" and "[e]ach case must be considered and evaluated on its own merits." *In re Kallen, supra*, 92 N. J. at 27. The determination of whether agencies have observed principles of basic fairness therefore requires "an examination of the facts in each case, giving weight to the effect of the decision on the agency's public policy." *Id.* at 26. My review of this case clearly establishes that the retroactive imposition of the sales tax on Airwork would be harsh and unfair.

Airwork had no reason to believe it was not conforming to the Division's policy. In 1966, after the passage of the New Jersey Sales and Use Tax Act, L. 1966, c. 30, § 1

(Act), the Sales Tax Bureau of the Division issued an "Official News Release" (Release), *New Jersey Tax Rptr. (CCH)*, No. 162, (July 11, 1966), stating *inter alia*:

> [305] Charges for repairs where the articles upon which the work is performed are delivered upon completion, pursuant to contract, to a purchaser outside the state for use outside the state are exempt from the sales tax.

The Division never adopted formal regulations governing this specific issue. Thus the Release, continuously printed, was the only statement on the topic for seven years.

In reliance on the Release, Airwork, which is principally engaged in the business of repairing aircraft engines, did not collect sales tax from its out-of-state customers. It did collect sales tax from its New Jersey customers. From Airwork's point of view, a 1967 tax audit confirmed the viability of this position. During its 1967 audit of Airwork, the Division concluded that Airwork's policy of not collecting sales tax from its out-of-state customers was correct. Although neither the Release nor the audit bars the Division from changing its policy, they do raise questions about the fundamental fairness of changing a policy without at least giving a taxpayer notice of that change.

On August 12, 1971, the Division of Tax Appeals promulgated its decision in *Fisher-Stevens Inc.* v. *Director, Div. of Taxation,* Docket S. T. 109, aff'd, 121 N. J. Super. 513 (App. Div. 1972), certif. den., 62 N. J. 575 (1973). Two years after the Division of Tax Appeals decision in *Fisher-Stevens,* and only *after* the Appellate Division's decision in *Fisher-Stevens,* the Division first published a document contradicting the Release. In its August-Sep-

tember 1973 edition of *State Tax News,* a bi-monthly newsletter of tax items of interest, the Division announced a complete reversal of its prior position and announced that sales of service performed on goods delivered to customers outside the State were subject to the sales tax. The next issue of *State Tax News,* the October-November 1973 issue, contained the following:

> *Service Performed in New Jersey*—The charges for taxable services performed in New Jersey upon tangible personal property are subject to the sales tax whether the property serviced is delivered within New Jersey or out-of-state * * *

[306] Although the APA, N.J.S.A. 52:14B-1 to -15, was in effect as of September 1, 1969, see L. 1968, c. 410, § 1, none of the rule-making procedures was followed in connection with the Division's pubications in the August-September 1973 and October-November 1973 editions of the *State Tax News.* Once alerted by these announcements, Airwork commenced collecting sales tax from its out-of-state customers until the Legislature specifically exempted those customers from the sales tax in 1977. See L. 1977, c. 54.

After publication of these announcements, the Division notified Airwork of its intention to assess sales and use tax for the period from July 1, 1970 to June 30, 1973. Because of the Release, however, the Division later took the position that the assessment period began August 12, 1971, the date of the Division of Tax Appeals' decision in *Fisher-Stevens, Inc.* v. *Director, Division of Taxation, supra,* Docket S.T. 109. The assessment was for $628,255.31.

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II

The Division cannot seriously maintain that it never changed its intepretation of the Act. The Division's lack of claim for sales tax for the period prior to the decision of the Division of Tax Appeals in *Fisher-Stevens* is itself acknowledgment that a change has occurred, as are its subsequent releases in 1973. Moreover, various statements by the Legislature concerning amendments to the Act recognize that a change in interpretation occurred.

In 1974, the Legislature passed a bill, later vetoed by the Governor for revenue reasons, that would have exempted the transactions at issue from the sales tax. The Assembly Committee on Taxation Statement to this bill provided, in relevant part:

> The committee has acted favorably on Assembly Bill No. 1628 in that it believes the bill serves to remove an inequitable situation, *and further, it is in keeping* [307] *with the original interpretation of the Sales Tax Act which subsequently was changed.*
>
> * * *
>
> *As noted during the first 6 or 7 years of the life of the act there would have been no sales tax, but several years ago, the interpretation was changed and the tax imposed.* In effect, this bill will return the situation to its original status.
>
> [Emphasis added.]

Those "first 6 or 7 years" were the years from 1966 to 1972 or 1973. Thus, not only did the Legislature perceive a change but, like Airwork, it perceived that change as occurring in 1973.

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Similarly, the Assembly Committee on Taxation Statement to A.1787 (1977), a bill which also exempted these transactions from sales tax, stated in relevant part:

> The bill proposes to exempt from the sales tax services provided by New Jersey companies on tangible personal property delivered out of state. Because New Jersey is the only State, with the possible exception of New Mexico, that imposes a sales tax on such transactions, it places New Jersey businesses at a considerable disadvantage in maintaining such operations.
>
> *The imposition of the tax is one which did not occur in the beginning years of the sales tax, but was imposed by interpretation later.* Such taxes, when assessed against New Jersey businesses, in many instances incur a loss because they are unable to collect from customers after the fact.
>
> [Emphasis added.]

This bill became law in 1977. L. 1977, c. 54. Since 1977, the services in question have been exempt from the sales tax.

III

The Division relies on the decision of the Division of Tax Appeals in *Fisher-Stevens* as notice of its new revised policy that sales tax is due on sales of services when delivery of the tangible personal property is out-of-state. It is difficult to see how an agency decision that is not on point and was never officially reported can constitute notice of a change in policy.

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Fisher-Stevens cannot by any stretch of the imagination be said to address the application of sales tax to the services at issue in this case. In *Fisher-Stevens* the court held that services performed and delivered in New Jersey were taxable. There was nothing novel in this approach. From the transcript [308] of the *Fisher-Stevens* trial, it is evident that the Division's policy was not to tax the services if the finished items rather than being mailed from New Jersey were instead shipped out of the state for mailing by the customer. This policy of course reflects the exemption Airwork claims existed. To contend that Airwork somehow should have read *Fisher-Stevens* and, having digested it, should have determined that the court's language, in which it held that the "use" of direct mail services occurred entirely within this state, actually meant that the rebuilding of nonresidents' aircraft engines for use outside the state was no longer exempt from the state sales tax is beyond belief. Moreover, this expectation is even less realistic when, as here, published, official statements were made by the Division that clearly stated that the sales tax should not be collected for repair charges on articles that were to be delivered and used out of state.

Further, *Fisher-Stevens,* was not even an opinion of a court. The decision of the Division of Tax Appeals was a decision of an administrative agency. Thus, many of the opinions of the Division of Tax Appeals were never published. Those opinions that were published were not published in official reporters such as the present *New Jersey Tax Court Reports.* Unless the Division of Tax Appeals specifically granted a taxpayer's request to receive all copies of its opinions, a taxpayer could not possibly become familiar with all its opinions. Even if a taxpayer made such a request, of course, it is not clear it would be granted.

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New Jersey courts have recognized these problems even with respect to reported court opinions. In *Glaser* v. *Downes,* 120 N. J. Super. 476, 491-92 (Ch. Div. 1972), rev'd in part, 126 N. J. Super. 10 (App. Div. 1973), certif. den., 64 N. J. 513 (1974), the trial court ruled that the gasoline service-station practice of giving free gifts for merely coming into a station was illegal. The court recognized, however, that it would be unfair to enforce *its* decision without first giving effective notice to service stations [309] that had been acting in reliance on the Division of Taxation's prior practice of not treating such gifts as illegal and held that:

> [T]he Director must give gasoline retailers throughout the State *ample written notice* of the illegality of each of these competitive devices. I leave to his discretion whether he takes this action by the adoption of appropriate regulations or the giving in some fashion of adequate written notice to all of the gasoline retailers operating in this State of the conclusions reached in this opinion. [*Id.* 120 N. J. Super. at 492 (emphasis added).]

The Appellate Division in *Glaser* v. *Downes, supra,* 126 N. J. Super. at 18-19, went even further, holding that merely mailing notices to all licensed retail motor fuel dealers was inadequate. If the Director was going to change his prior position and treat the giveaways as illegal, he had to adopt regulations to that effect, and do so in the manner prescribed by the APA, especially policy previously followed by the Division of not treating such giveaways as illegal. *Id.* at 18. After ruling that the Director had to comply with the APA, the court concluded that "[w]hat he did denied due process of law to the three companies * * * involved." Id. at 19.

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As a practical matter, allowing unreported decisions of administrative agencies to provide sufficient notice of an agency's changed position imposes an intolerable burden on the taxpayer. In addition to regularly checking regulations and Division releases, businessmen would have to meticulously check an agency's decisions, many of which are unreported, for cases that might possibly affect them. Requiring businesses to check for these decisions is a useless waste of time, energy, and money. It would be much simpler, more logical, and more efficient for the Division to simply amend an existing release or promulgate a new regulation when a case causes it to change its policy. This would adequately serve notice to taxpayers of changes in policy and comport with due process.

I recognize that the Division, with the best of intentions, issues releases informally to aid taxpayers in complying with the new tax after the enactment of a new tax statute. Nevertheless, once such a release on a specific topic is set forth, I believe that it is only fair that a change of position similarly be [310] set forth in a notice. The Division can easily and inexpensively satisfy fairness concerns by merely issuing a new release as it later did in *State Tax News*. Such a release would have provided adequate notice to Airwork to collect sales tax from its out-of-state customers. The cost to the state of such a notice would have been minimal. Thus, to the extent that administrative costs or effects on the efficient operation of government may be legitimate concerns in assessing what process is due in any case, *see Mathews* v. *Eldridge*, 424 U. S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976), such concern is easily satisfied here.

I would hold, therefore, that Airwork first received sufficient notice of the Division's change of policy in 1973 when the change was announced in issues of *State Tax News*.

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IV

If Airwork did not receive sufficient notice of change in policy until 1973, then the Division's assessment of sales tax prior to that date is retroactive. This Court has recognized that constitutional due process imposes certain limits on the retroactive application of taxing statutes. *See Klebanow* v. *Glaser,* 80 N. J. 367 (1979). As stated by the Supreme Court in *Welch* v. *Henry,* 305 U. S. 134, 147, 59 S. Ct. 121, 125, 83 L. Ed. 87, 93 (1938), and quoted with approval by this Court in *Klebanow, supra,* 80 N. J. at 376:

> In each case it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation.

Or, stated another way:

> The need of the government for revenue has hitherto been deemed a sufficient justification for making a tax measure retroactive whenever the imposition seemed consonant with justice and the conditions were not such as would ordinarily involve hardship. [*Id.* at 375 (quoting with approval *Untermyer* v. *Anderson,* 276 U. S. 440, 450, 48 S. Ct. 353, 356, 72 L. Ed. 645, 649 (1928)) (Brandeis, J., dissenting).]

The hardship that exacerbates the unfairness of retroactive application of the agency rule here is that the reversal of the [311] rule has transformed a statutory agent for the collection of tax into a delinquent taxpayer. *Cf. Central Ill. Pub. Serv. Co. v. United States,* 435 U.S. 21, 33 n. 12, 98

S. Ct. 917, 923 n. 12, 55 L. Ed. 2d 82, 91 n. 12 (1978) (expressing concern that retroactive assessment of tax on an employer who had failed in good faith to withhold taxes for employee wages in the form of lunch reimbursement would be "almost punitive in light of the facts"). Although personally liable for the taxes required to be collected under the Sales and Use Tax, N.J.S.A. 54:32B-14, Airwork's role in the statutory scheme is as *tax collector* on behalf of the State of New Jersey. *See* N.J.S.A. 54:32B-12. It was in this capacity that Airwork, and others similarly situated, were advised by the Division not to collect the sales tax on services performed for out-of-state customers. The effect of retroactive application is to allow the consumer to escape the tax, while imposing it instead on the vendor. As such, retroactive application changes the very nature of the tax from a sales tax to be paid by the customer to a business tax to be paid by the vendor for the privilege of selling retail goods and services. The vendor can no longer collect the tax from the customer after the transaction has been completed, yet retroactive application *first* imposes the tax *after* the transaction has occurred.

The hardship is particularly worthy of note when the taxpayer could have been expected to refrain from the conduct that created his tax liability had he anticipated the tax. *See Welch* v. *Henry, supra,* 305 U. S. at 147, 59 S. Ct. at 125, 83 L. Ed. at 93; *Pressed Steel Car Co.* v. *Lyons,* 7 Ill. 2d 95, 105-06, 129 N. E. 2d 765, 770-71 (1955); *Hercules Powder Co.* v. *State Bd. of Equalization,* 66 Wyo. 268, 306, 208 P. 2d 1096, 1112, reh'g denied, 66 Wyo. 309, 210 P. 2d 824 (1948); *cf. In re Kaplan,* 178 N. J. Super. 487, 496 (App. Div. 1981) (notions of fundamental fairness impaired in action to retroactively enforce Medicaid anti-fraud provision in part because had appellant been able to anticipate the statute "it seems likely that appellant

would have altered his conduct"). Here the conduct that created Airwork's [312] liability was its failure to collect and pay to the state the sales tax. That conduct surely would have been avoided by Airwork had it known or anticipated that its repairs on out-of-state property would be taxed. Simply stated, had Airwork known that the state would treat such repairs as taxable, it would have collected the tax from its out-of-state customers. Indeed, once Airwork received notice in 1973 that the state would treat these repairs as taxable, it immediately began collecting the tax from its out-of-state customers.

V

Today in *Metromedia, Inc.* v. *Director, Div. of Taxation,* 97 N. J. 313 (1984), we held that the Division's decision to apply the audience share factor in allocating taxpayer's receipts to New Jersey was tantamount to an agency rule and consequently had to be promulgated in accordance with the APA. In that opinion, we stated:

> Similarly, an agency determination can be regarded as a "rule" when it effects a material change in existing law. *See Crema* [v. *New Jersey Dept. of Environmental Protection*], *supra,* 94 N. J. [286] at 302; K.C. Davis, *Administrative Law Treatise* § 7:25 at 186 (2d ed .Supp. 1982); *Ford Motor Co.* v. *Fed. Trade Comm'n,* 673 F. 2d 1008, 1009 (9th Cir. 1981), *cert. den.,* [459] U. S. [999, 103 S. Ct. 358], 74 L. Ed. 2d 394 (1982) (an agency determination that changes existing law and has widespread application must be addressed by rule-making and not adjudication). This feature relates not only to fairness to the individual party actually before the

> agency but to other persons as well. When an agency's determination alters the *status quo,* persons who are intended to be reached by the finding, and those who will be affected by its future application, should have the opportunity to be heard and to participate in the formulation of the ultimate determination. *See Bergen County Pines Hosp.* [v. *Dept. of Human Services*], *supra,* [96] N. J. [456]; *Crema, supra,* 94 N. J. at 303; *Boller Beverages, Inc.* [v. *Davis*], *supra,* 38 N. J. [138] at 151. [Id. at 330].

We further held that one of the factors determining whether an agency determination must be considered an administrative rule is whether it "reflects an administrative policy that * * * constitutes a material and significant change from a clear, past agency position on the identical subject matter." Id. at 331.

I disagree with the majority and believe that based on the totality of circumstances in this case, it is clear that the policy [313] announced in 1973 in the *State Tax News* constituted a material and significant change from the prior policy of the Division as stated in its Release. This conclusion is confirmed by the Division's audit of Airwork, is reflected in its failure to assess taxes for the entire period, and is affirmed by the Legislatures' statements.

Both the Tax Court and the majority assume that Airwork is contesting the right of the Division initially to make such a ruling under its assessment power. I am not. I am however, claiming that once such a ruling is made, it may not be changed without notice to the affected public. Particularly in a case like this that transforms Airwork from the role of tax collector to that of primary taxpayer, lack of notice produces an extraordinarily harsh and unfair result.

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Accordingly, I would hold under the APA that Airwork was entitled to notice of the Division's changed position set forth in its 1973 Release. Since the Division failed to give notice, it violated the procedures under the APA and I would hold its assessment invalid.

For Affirmance—Chief Justice WILENTZ and Justices SCHREIBER, HANDLER and O'HERN—4.

For reversal—Justices CLIFFORD, POLLOCK and GARIBALDI—3.

APPENDIX G

Order of the Supreme Court of New Jersey Denying Petition for Certification

(Filed: September 20, 1984)

SUPREME COURT OF NEW JERSEY

C-18 SEPTEMBER TERM 1984

21,466

ON PETITION FOR CERTIFICATION

S.G. FRANTZ CO., INC.,

Plaintiff-Petitioner,

vs.

DIRECTOR, DIVISION OF TAXATION,

Defendant-Respondent.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1483-81T3 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

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ORDERED that the appeal in the within matter is dismissed pursuant to *R.* 2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 18th day of September, 1984.

STEPHEN TOWNSEND
Clerk

APPENDIX H

Order of the Supreme Court of New Jersey Denying Motion for Reconsideration

(Filed: October 25, 1984)

SUPREME COURT OF NEW JERSEY

M-192 SEPTEMBER TERM 1984

21,466

S.G. FRANTZ CO.,

Plaintiff-Movant,

vs.

DIRECTOR, DIVISION OF TAXATION,

Defendant-Respondent.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 23rd day of October, 1984.

STEPHEN TOWNSEND
Clerk

APPENDIX I

Relevant Provisions of New Jersey Sales and Use Tax Act

SALES AND USE TAX ACT OF THE STATE OF NEW JERSEY

N.J.S.A. 54:32B-1 et seq. (L. 1966, c. 30, as amended by L. 1966, c. 53, c. 132, c. 140; L. 1967, c. 25; L. 1968, c. 106; L. 1969, c. 143; L. 1970, c. 7, c. 25; and L. 1972, c. 27)

AN ACT imposing a tax on retail sales, storage and use of tangible personal property and on the sales of certain services within the State; providing for the licensing of retailers; defining certain words for the purposes of the act; prescribing the method of collecting the tax imposed; providing penalties for violations; and making an appropriation for the enforcement thereof.

N.J.S.A. 54:32B

2. Definitions.—Unless the context in which they occur requires otherwise, the following terms when used in this act shall mean:

• • •

(c) Purchaser. A person who purchases property or who receives services.

(d) Receipt. The amount of the sales price of any property and the charge for any service taxable under this act. • • •.

• • •

(f) Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration,

or any agreement therefor, including the rendering of any service, taxable under this act, for a consideration or any agreement therefor.

• • •

(h) Use. The exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time, withdrawal from storage, any installation, any affixation to real or personal property, or any consumption of such property.

(i) Vendor. (1) The term "vendor" includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this act;

(B) A person maintaining a place of business in the State and making sales, whether at such place of business or elsewhere, to persons within the State of tangible personal property or services, the use of which is taxed by this act;

(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the State of tangible personal property or services, the use of which is taxed by this act; and

(D) Any other person making sales to persons within the State of tangible personal property or services, the use of which is taxed by this act, who may be authorized by the director to collect the tax imposed by this act;

• • •

(y) "Property and services the use of which is subject to tax" shall include: (a) all property sold to a person within the State, whether or not the sale is made within the State, the use of which property is subject to tax under section 6 or will become subject to tax when such property is received by or comes into the possession or control of such person within the State; and (b) all services rendered to a person within the State, whether or not such services are performed within the State, upon tangible personal property the use of which is subject to tax under section 6 or will become subject to tax when such property is received by or comes into possession or control of such person within the State.

• • •

N.J.S.A. 54:32B

3. Imposition of sales tax. On and after July 1, 1966 and continuing through February 28, 1970 there is hereby imposed and there shall be paid a tax of 3%, and on and after March 1, 1970 there is hereby imposed and there shall be paid a tax of 5% upon:

(a) The receipts from every retail sale of tangible personal property, except as otherwise provided in this act.

(b) The receipts from every sale, except for resale, of the following services:

• • •

(2) Installing tangible personal property, or maintaining, servicing, repairing tangible personal property not held for sale in the regular course of business,

• • •

Appendix I

N.J.S.A. 54:32B

6. Imposition of compensating use tax. Unless property or services have already been or will be subject to the sales tax under this act, there is hereby imposed on and there shall be paid by every person a use tax for the use within this State of 3% on and after July 1, 1966 and continuing through February 28, 1970 and of 5% on and after March 1, 1970, except as otherwise exempted under this act, (A) of any tangible personal property purchased at retail, (B) of any tangible personal property manufactured, processed or assembled by the user, if items of the same kind of tangible personal property are offered for sale by him in the regular course of business, and (C) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any taxable services described in subsections (b) (1) and (2) of section 3 have been performed. For purposes of clause (A) of this section, the tax shall be at the applicable rate, as set forth hereinabove, of the consideration given or contracted to be given for such property or for the use of such property, but excluding any credit for property of the same kind accepted in part payment and intended for resale, plus the cost of transportation except where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser. For the purposes of clause (B) of this section, the tax shall be at the applicable rate, as set forth hereinabove, of the price at which items of the same kind of tangible personal property are offered for sale by the user, and the mere storage, keeping, retention or withdrawal from storage of tangible personal property by the person who manufactured, processed or assembled such property shall not be deemed a taxable use by him. For purposes of clause (C) of this section, the tax shall be at the applicable rate, as set forth hereinabove, of the con-

sideration given or contracted to be given for the service, including the consideration for any tangible personal property transferred in conjunction with the performance of the service, plus the cost of transportation except where such cost is separately stated in the written contract, if any, and on the bill rendered to the purchaser.

N.J.S.A. 54:32B

7. Special rules for computing receipts and consideration.—(a) The retail sales tax imposed under subsection (a) of section 3 and the compensating use tax imposed under section 6, when computed in respect to tangible personal property wherever manufactured, processed or assembled and used by such manufacturer, processor or assembler in the regular course of business within this State, shall be based on the price at which items of the same kind of tangible personal property are offered for sale by him. (b) Tangible personal property, which has been purchased by a resident of the State of New Jersey outside of this State for use outside of this State and subsequently becomes subject to the compensating use tax imposed under this act, shall be taxed on the basis of the purchase price of such property, provided, however:

(1) That where a taxpayer affirmatively shows that the property was used outside such State by him for more than 6 months prior to its use within this State, such property shall be taxed on the basis of current market value of the property at the time of its first use within this State. The value of such property, for compensating use tax purposes, may not exceed its cost.

(2) That the compensating use tax on such tangible personal property brought into this State (other than for complete consumption or for incorporation into real prop-

erty located in this State) and used in the performance of a contract or subcontract within this State by a purchaser or used for a period of less than 6 months may be based, at the option of the taxpayer, on the fair rental value of such property for the period of use within this State.

* * *

N.J.S.A. 54:32B

11. Exemptions from use tax.—The following uses of property shall not be subject to the compensating use tax imposed under this act:

* * *

(3) In respect to the use of property or services upon the sale of which the purchaser would be expressly exempt from the taxes imposed under subsection (a) or (b) of section 3.

* * *

(6) In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other State or jurisdiction within any other State but only when it is shown that such other State or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this State. To the extent that the tax imposed by this act is at a higher rate than the rate of tax in the first taxing jurisdiction, this exemption shall be inappicable and the tax imposed by section 6 of this act shall apply to the extent of the difference in such rates.

Appendix I

N.J.S.A. 54:32B

12. Collection of tax from customer. (a) Every person required to collect the tax shall collect the tax from the customer when collecting the price, service charge, amusement charge or rent to which it applies. If the customer is given any sales slip, invoice, receipt or other statement or memorandum of the price, service charge, amusement charge or rent paid or payable, the tax shall be stated, charged and shown separately on the first of such documents given to him. The tax shall be paid to the person required to collect it as trustee for and on account of the State.

(b) For the purpose of the proper administration of this act and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subsections (a), (b) and (c) of section 3, all rents for occupany of the type mentioned in subsection (d) of said section, and all amusement charges of any type mentioned in subsection (e) of said section, are subject to tax until the contrary is established, and the burden of proving that any such receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Unless a vendor shall have taken from the purchaser a certificate, signed by the purchaser and bearing his name and address and the number of his registration certificate, to the effect that the property or service was purchased for resale or the purchaser prior to taking delivery, furnishes to the vendor any affidavit, statement or additional evidence, documentary or otherwise, which the director may require demonstrating that the purchaser is an exempt organization described in section 9(b) (1), the sale shall be deemed a taxable sale at retail. Provided however, the

director may, in his discretion, authorize a purchaser, who acquires tangible personal property or services under circumstances which make it impossible at the time of acquisition to determine the manner in which the tangible personal property or services will be used, to pay the tax directly to the director and waive the collection of the tax by the vendor.

* * *

N.J.S.A. 54:32B

14. Liability for the tax.—(a) Every person required to collect any tax imposed by this act shall be personally liable for the tax imposed, collected or required to be collected under this act. Any such person shall have the same right in respect to collecting the tax from his customer or in respect to nonpayment of the tax by the customer as if the tax were a part of the purchase price of the property or service, amusement charge or rent, as the case may be, and payable at the same time; provided, however, that the director shall be joined as a party in any action or proceeding brought to collect the tax.

(b) Where any customer has failed to pay a tax imposed by this act to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the director and it shall be the duty of the customer to file a return with the director and to pay the tax to him within 20 days of the date the tax was required to be paid.

(c) The director may, whenever he deems it necessary for the proper enforcement of this act, provide by regulation that customers shall file returns and pay directly to the director any tax herein imposed, at such times as re-

turns are required to be filed and payment over made by persons required to collect the tax.

(d) No person required to collect any tax imposed by this act shall advertise or hold out to any person or to the public in general, in any manner, directly or indirectly, that the tax is not considered as an element in the price, amusement charge or rent payable by customers, or that he will pay the tax, that the tax will not be separately charged and stated to the customer or that the tax will be refunded to the customer. Upon written application duly made and proof duly presented to the satisfaction of the director showing that in his particular business it would be impractical for the vendor to separately charge the tax to the customer, the director may waive the application of the requirement herein as to such vendor.

* * *

N.J.S.A. 54:32B

24. General powers of the director.—In addition to the powers granted to the director in this act, he is hereby authorized and empowered:

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this act and the purposes thereof;

* * *

6. To assess, determine, revise and readjust the taxes imposed by this act;

* * *

APPENDIX J

Relevant Provisions of Administrative Procedure Act of the State of New Jersey

L. 1968, c. 410 § 1, eff. Sept. 1, 1969; N.J.S.A. 52:14B-1 *et seq.*

N.J.S.A. 52:14B-2. Definitions

As used in this act:

* * *

(e) "Administrative rule" or "rule", when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intra-agency and inter-agency statements; and (3) agency decisions and findings in contested cases.

* * *

N.J.S.A. 52:14B-4. Notice and hearing

(a) Prior to the adoption, amendment, or repeal of any rule, except as may be otherwise provided the agency shall:

> (1) Give at least 20 days' notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and

the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely request of the agency for advance notice of its rule-making proceedings and in addition to other public notice required by law shall be published in the New Jersey Register;

(2) Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. The agency shall consider fully all written and oral submissions respecting the proposed rule.

* * *

(d) No rule hereafter adopted is valid unless adopted in substantial compliance with this section. A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this section must be commenced within 1 year from the effective date of the rule.